Chapter Eight

COMPETING CLAIMS, CONTESTED ACCESS

Of all the lands within the continental United States the federal government seized from their original American Indian owners, the Black Hills remain among the most contested and controversial. The lands that make up Wind Cave National Park were part of the longest running American Indian claims case in history, *Sioux vs. United States* [C-531-7], otherwise known as the Sioux Black Hills Claim. After nearly sixty years of congressional deliberation and court litigation, the Sioux's Black Hills claim case reached a settlement in 1980 when the Supreme Court ruled that the United States had taken the Hills illegally without just compensation. The eight tribal claimants who were parties in the suit have not accepted this settlement, which amounted to 106 million dollars. Today, a sum of money, now rapidly approaching one billion dollars, sits in the U.S. treasury as settlement for the United States' illegal taking of the Black Hills from the Sioux Nation.[1]

Even before the Black Hills Claim reached the Supreme Court, the Sioux were moving forward in other ways to reclaim possession of the Black Hills. In addition to land takeovers, including one at Wind Cave National Park in 1981, there were several attempts from 1985 to 1993 to introduce legislation in Congress that would return sizable amounts of public land in the Black Hills to the Sioux, but none of these moved further than the hearing stage. In the same decade, the Sioux took other steps to assert their political and cultural interests in the region. Today, the question of the "ownership" of the Black Hills remains unresolved. Although the federal government takes the position that the courts have settled the question, the Sioux remain fiercely opposed to accepting the only remedy the judicial system has to offer them for the illegal taking of the Hills -- a monetary settlement. They still stand united in their determination to reacquire legal possession of land currently claimed by the federal government. The question of the Black Hills sits at an impasse not only with respect to the Sioux's unresolved claim, but also in relation to the unlitigated claims that the Cheyennes and Arapahos hold to the Black Hills as well. Neither of these tribes pressed their Black Hills claims in court, although both were represented in the deliberations surrounding the case before the Sioux filed their claim in 1920 and both sought counsel and attempted unsuccessfully to get jurisdictional acts passed to pursue their claims.

Beyond the battles involving ownership of the land, there has been litigation over tribal religious access to the Hills stemming from the passage of the American Indian Religious Freedom Act of 1978. These need to be discussed here as well. In order to understand the history of the various legal struggles over the Black Hills in the twentieth century, including the lands on which Wind Cave National Park now stand, we must begin with an understanding of the nineteenth century federal treaties and agreements in which the Sioux, Cheyennes, and Arapahos were the central parties.

[1] Lakota or Dakota is the preferred self-ascription of people identified historically and in legal dealings with the United States as Sioux. To avoid confusion, the term Sioux will be used in this chapter to designate the Lakotas (Teton Sioux) and the Dakotas (Mdewakanton, Wahpekute, Sisseton, Wahpeton, Yankton, and Yanktonnai Sioux) who were parties to various treaties with the United States and in later years listed as claimants in suits against the U.S. government.

I. TREATIES AND AGREEMENTS

The period when treaties were negotiated between the United States and the tribal nations who historically occupied the Black Hills covers the years between 1825 and 1871, the year Congress formally ceased the process of making treaties with tribes and began to enter into legislated agreements with them. In 1870, the House of Representatives lobbied for the abolition of the treaty system. With the support of the Commissioner of Indian Affairs, Ely S. Parker, a Seneca Indian from New York, the federal government unilaterally modified the manner in which it negotiated with tribes. Instead, it now acted from an attitude that tribes were ward-like entities and were thus subject to domestic legislation approved by the Senate, the House of Representatives, and the President. In 1871, legislation was passed that prohibited the United States from recognizing tribes as independent nations and from contracting with them by treaty. Henceforth, all dealings with tribes would take place in the form of agreements (Lazarus 1991:80; Wilkins 1997:229, 237-239).

A review of all treaties, agreements, and statutes between Indian tribes and the United States government, as compiled by Charles J. Kappler (1903), and a survey of all land cessions by Indian tribes in the United States, summarized and mapped by Charles C. Royce (1899), indicates that only the Sioux, Cheyennes, and Arapahos entered into treaties and agreements involving the consideration of lands in the Black Hills and at Wind Cave National Park. In each case, however, none of the statutes affecting lands in the Black Hills included the entirety of the populations making up these three tribal nations. In the case of the Arapahos and Cheyennes, only the northern divisions of these two tribes were represented in deliberations affecting the Black Hills. In the case of the Sioux, while most of the eastern divisions were not represented in the 1851 Fort Laramie Treaty, some were parties to the 1868 Fort Laramie Treaty and the Black Hills Agreement of 1877, which led to the illegal taking of the Black Hills. The Santee Tribe of Nebraska and the Yanktonnai of Crow Creek and Standing Rock were not parties to the 1851 Fort Laramie Treaty,[2] but they were included as signatories in the 1868 Treaty and the Black Hills Agreement of 1876, which was passed into law by Congress in 1877. The Yankton Sioux Tribe was represented in the 1851 Treaty but not the negotiations surrounding the 1868 Treaty or the 1876 Agreement. Most of the Sioux affiliated with the Spirit Lake Sioux Tribe, the Sisseton-Wahpeton Sioux Tribe, the Flandreau Sioux Tribe, and the federally recognized Sioux communities in Minnesota were not parties to any treaties or land cessions relating to the Black Hills.[3] The Sioux Nation claim to the Black Hills, submitted and litigated in federal courts between 1923 and 1980, included the following tribes: Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, Lower Brule Sioux Tribe, Fort Peck Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Santee Sioux Tribe, and Standing Rock Sioux Tribe. Of the other tribes with known historical affiliations to the Black Hills, including the Plains Apaches, Comanches, Shoshones, Kiowas, Crows, Hidatsas, Mandans, Arikaras, Pawnees, and Poncas, none were parties to treaties or agreements governing land cessions in or near the Black Hills. Moreover, none of these tribes ever filed claims with the U.S. Court of Claims or the Indian Claims Commission that pertained to lands in the Black Hills or at Wind Cave National Park.

What follows is a list of all the federal treaties and agreements, governing land cessions to which the western Sioux, the Cheyenne, and/or the Arapaho nations were parties and which have

[2] In 1853, an amendment to the 1851 treaty was devised to include the Yanktonnai in the provisions and annuity payments of this treaty (DeMallie 2001; 780).

[3] Because of extensive patterns of intermarriage between modern Sioux tribes (Albers 1974), many individuals who are enrolled in these tribes are descended from Sioux who were parties to these treaties.

some bearing on the legal standing of these tribes in relation to the Black Hills. This chronological listing not only highlights the provisions of each statute, but it also discusses their consequences in regards to continuing claims on the Black Hills.

A. Atkinson and O'Fallon Treaty of 1825

In 1825, General Henry Atkinson and Indian Agent Benjamin O'Fallon traveled up the Missouri River to assess the numbers and whereabouts of tribes along the river and to enter into treaties of friendship, whereby the tribal signatories pledged their loyalty to the United States and its traders (Jensen and Hutchins 2001; see also, Chapter Four). Sioux representing the Teton, Yankton, and Yanktonnai divisions, who occupied lands from the mouth of the White River to the Cannonball, signed four treaties, as did a party of Cheyenne leaders (Kappler 1903:2:161-166). When representatives of these tribes signed the 1825 treaties, they acknowledged the right of the United States to regulate trade in the region. It is clear that the tribal parties who signed these treaties did not act on behalf of their entire nation. Nor is it likely that they fully understood the consequences of their signing, which the federal government construed as according it sovereign power to intervene in their affairs (Weist 1977:41-42).

B. Fort Laramie Treaty of 1851

The Fort Laramie Treaty of September 17, 1851 [11 Stat.749] (Kappler 1903:2:440-442) was another friendship treaty under which many tribal nations in the northern Plains pledged a lasting peace with the United States. Most divisions of the Teton Lakota (Sioux) and the Yankton Dakota (Sioux) attended the treaty deliberations, but only Sicangu, Ooehnunpa, and Yankton \signed it. Some of the northern and southern divisions of the Arapaho were also party to the treaty (Fowler 1982:28-32). In the case of the Cheyenne, only the southern bands appear to have signed the treaty (Powell 1981:1:110). Even though Congress never ratified this treaty, it subsequently carried considerable weight in supporting or contesting tribal land claims in federal courts.

In the process of making peace, the tribal parties to the 1851 Fort Laramie Treaty ostensibly approved boundaries to mark their respective territorial domains (Lazarus 1991:17). Technically, no tribal nation surrendered any land in this treaty, but as a number of scholars (Berthong 1963:121; Lazarus 1991:17-19; DeMallie 2001a:795) have argued, this document codified and concretized a series of territorial borders that would have a lasting impact for the tribes involved in these deliberations. It effectively restricted the territorial boundaries around which tribes negotiated land cessions in later years. Not only did it exclude the Cheyennes and Arapahos from lands that they had shared with the Sioux for over a century, including the Black Hills; it also deprived the Sioux and their Cheyenne and Arapaho allies of territories they had jointly wrestled from the Kiowas and Crows in previous decades (Lazarus 1991:18). Although Sioux rights were disadvantaged in the second instance, the interests of the Cheyennes and the Arapahos were jeopardized in both. It also seriously impaired the ability of these two tribes to make claims on lands they had continuously and jointly occupied for more than a century, and once again, some of these included the Black Hills.

The lands designated for the Sioux and the Cheyenne-Arapaho under Article 5 of the Fort Laramie Treaty were designated as follows: 1) the territory of the Sioux began at the mouth of the White River and followed a southwesterly line to the forks of the Platte, and from there, it ascended the Platte to Red Butte and then it moved north along the western side of the Black Hills to the headwaters of the Heart River, down this river to the Missouri and then back to the starting point on the mouth the White River; and 2) the land jointly assigned to the Arapahos and

Cheyennes commenced at the Red Butte and followed the North Platte River to the Rocky Mountains, from which point the boundary extended south to the headwaters of the Arkansas River and then east to the crossing of the Santa Fe Trail and from there, it returned to Red Butte by way of the forks of the Platte River (Kappler 1903:2:441, see Figure 8 in Chapter Five).

As discussed in Chapters Three to Five, the tribal nations of the plains distributed themselves across geographic space in ways that were very different from the manner in which white Americans established their relationships to the land. By projecting their own sense of landed property rights onto tribal territorial domains, the United States, as Edward Lazarus (1991:17) puts it, "affirmed formally that Indians possessed personal and property rights including rights in their lands. It also established, as Chief Justice John Marshall had written in the 1832 Supreme Court case Worcester v. Georgia: Indian tribes were 'distinct, independent, political communities,' who retained at least limited rights of self-government" (in Lazarus ibid.). Even though the treaty may have created a "legal benchmark" for judging future federal decisions and actions, it seriously impaired the rights of the tribes to make claims based on their own standards of sovereign interest in landed property. Although government officials who were party to the 1851 Fort Laramie Treaty emphatically told the tribal parties assembled at the treaty deliberations that the boundaries should not be construed as interfering in their movements, the making of these borders on paper had lasting consequences for the judgments that federal courts would later deliver with regards to whether or not tribes held aboriginal title to certain land holdings. According to the Indian Claims Commission's, "Findings of Facts," dated August 27, 1965 (Horr 1974:56), Colonel Mitchell is reported to have told the tribes that "in fixing a boundary to their country, he had no purpose of limiting them to that boundary in hunting, or to prohibit them from going into the territory of any other Nation, so long as they remained at peace." Yet, this is precisely what happened a century later when the Indian Claims Commission deliberated on the government's liability to tribes for lands either illegally gained or inadequately compensated (Lazarus 1991:49-69).

Another major feature of the 1851 Treaty were provisions whereby tribes gave the United States the right to construct roads and military posts in their territories. Tribes agreed to furnish restitution for crimes committed against U.S. citizens. In return, the United States committed itself to protecting tribes from the wrongdoings of its own citizens, and it promised to pay each of them fifty thousand dollars over a ten-year period for the right to construct roads and posts through their territories (Kappler 1903:2:440-442; Lazarus 1991:17-18; Price, C. 1996:31). The Senate, however, did not agree to this commitment and slashed the number of years the government was obligated to make payments without ever informing the tribes of their amendment (Lazarus 1991:19-20). In the end, the 1851 Fort Laramie Treaty was a failure because, as Lazarus (Ibid:20) puts it, "one party amended the terms, the other ignored them."

C. The Treaty of Fort Wise in 1861

In 1861, ten years after the conclusion of the failed Fort Laramie Peace Treaty, the United States entered into a treaty [12 Stat., 1163] (Kappler 1903:2:614-617) with representatives of the Southern Cheyenne and Southern Arapaho nations at Fort Wise in eastern Colorado. Under the provisions of this treaty, all of the Cheyenne-Arapaho territory stipulated in the Fort Laramie Treaty of 1851, except for a small area set aside in eastern Colorado as a reservation for their joint occupancy, was ceded in exchange for a settlement of $450,000 to be paid out over a fifteen year period (Kappler 1903:2:614-617; Berthong 1965:149-151). The problem with this treaty was that most of the Northern Cheyennes and Northern Arapahos never entered into the negotiations, even though they were included in the lands designated by the 1851 Fort Laramie

Treaty. In addition, many Southern Cheyennes, especially the followers of the Dog Soldier bands, refused to sign it (Weist 1977:48). Although this treaty paved the way for the settlement of eastern Wyoming and Colorado by American mining and agricultural interests, it did so at a terrible cost to the large numbers of Cheyenne and Arapaho who were not represented in the deliberations. One of its many consequences was that it left the Northern Cheyennes and Northern Arapahos in a legal limbo with respect to their future claims against the United States. Not represented at the cession of their 1851 Fort Laramie lands and barely acknowledged in the 1868 Fort Laramie Treaty, they were cast adrift, situated betwixt and between treaties, to which they were linked by default rather than intent. Even to this day, some of their land claims remain unresolved as a result, including those connected to the Black Hills.

D. Indian Peace Commission Treaties

In March of 1865, Congress passed an act authorizing expenditures to make peace with all the tribes along the Missouri and Platte rivers. A peace treaty was negotiated with the Yanktonnai at Fort Sully that provided compensation in the form of annuities over a twenty-year payment period (Kappler 1903:2:690-692).[4] Although the Yanktonnai objected to the building of overland routes through their country and increased steamboat traffic on the Missouri, they signed the treaty, which was ratified by Congress (DeMallie 2001:781).

Negotiations farther west with various divisions of the Tetons or Lakota Sioux, Cheyennes, and Arapahos were not concluded as easily. Unable to defeat these tribal nations militarily, the federal government authorized E. B. Taylor to conclude another treaty on its behalf that would bring a lasting peace to the region and permit the construction of roads and posts to accommodate overland travel (Weist 1977:58-59; Price, C. 1996:55-61; Lazarus 1991:33-37). For reasons already described in Chapter Five, the commission failed to secure the signatures of the bands whose territories would have been most affected by the building of the road, although it did manage to get the permission of leaders whose hunting grounds were far-removed from the area. While E.B. Taylor argued that the treaty negotiations had been a success, Congress disagreed and did not ratify the treaty. It can be argued that by failing to gain the full consent of the Lakotas, Cheyennes, and Arapahos, the 1865-treaty commission paved the way for some of the liberal provisions in the Fort Laramie Treaty of 1868 that established the Great Sioux Reservation and the large hunting commons in the Republican and Powder River countries.

1. 1867 Medicine Lodge Creek Treaties

On July 20, 1867, Congress authorized expenditures for the formation of another Indian Peace Commission to secure the interests of the United States by negotiating treaties with tribes throughout the western plains The first treaty [15 Stat., 589] was signed on October 17, 1867 by the Comanches, Kiowas, and Plains Apaches (Kappler 1903:2:759-760), and on October 28, 1867, the Southern Cheyennes, and Southern Arapahos signed their treaty [15 Stat., 593] at Medicine Lodge Creek in Kansas (Kappler 1903:2:760-764). Under the terms of these treaties, the tribes agreed to keep the peace with the United States and its citizens, allow the construction of roads and railroads across their territories in the southern and central plains, and cede all of their lands in the present day state of Kansas. The Southern Cheyennes and Southern Arapahos settled for a reservation in what is now western Oklahoma in exchange for relinquishing rights to

[4] Yanktonnai were not represented at Fort Laramie nor were they party to the Yankton land cession even though they were later included in some of the annuity distributions (DeMallie 2001:780-781).

their reservation lands in Colorado secured under the Fort Wise Treaty of 1861. Like the other parties to the treaty, they were promised a cash payment over twenty years, and an agency with personnel to support farming and other "civilizing" programs (Berthong 1965:297-298). In addition, the Southern Cheyennes, Southern Arapahos, and the other three tribes who were parties to these treaties retained the right to continue hunting off-reservation as far north as the Arkansas River as long as the bison remained in the region and as long as the tribes did not interfere with the construction of the railroads and the passage of travelers along the overland trails (Berthong 1965:298). Some of the considerations in this treaty played a role in the 1868 Fort Laramie Treaty [15 Stat., 655] with the Northern Arapahos and Northern Cheyennes.

2. The Fort Laramie Treaties of 1868

Meanwhile, the commission was deliberating with various bands of Sioux, Northern Cheyennes, and Northern Arapahos at Fort Laramie and other locations along the Platte and Missouri rivers to secure similar concessions in the northern reaches of the plains. Over the next ten months, the commissioners successfully negotiated and concluded the terms of a treaty with many of the bands of the Sioux on April 29, 1868, but they failed to meet with leaders of many of the more independent northern bands (Price, C. 1996:77-79). Eventually, many of these leaders, including Man Afraid of His Horses and Red Cloud, signed the treaty in November of 1868, but some of the northern Sioux, including Crazy Horse and Sitting Bull, refused to negotiate or sign it (Ibid:79-83).

In crafting the Fort Laramie Treaty [15 Stat., 635] (Kappler 1903:2:770-775), the Indian Peace Commission worded this treaty much like the other treaties it concluded in 1867 and 1868. Under Article 1, the parties agreed to abstain from war and to punish anyone on either side who engaged in aggressive acts against the other (Kappler 1903:2:770). Article 2 specified what territory would be included in a reservation set aside for the parties to the treaty. The Great Sioux Reservation, as it became popularly known, was created for the "undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing with the consent of the United States, to admit amongst them." This encompassed all lands west of the Missouri River in present-day South Dakota (Ibid.). Articles 4 through 10 contained provisions to establish agencies and to support tribal education, health, and agricultural needs (Ibid:771-773). Article 11 conferred the right to hunt on any lands north of the North Platte River and along the Republican and Smokey Hill rivers as long as buffalo remained in sufficient numbers "to justify the chase," but it also stipulated that the tribal parties would refrain from interfering with the construction of railways being built in these areas and from harassing emigrants along the overland trail. In addition, the government agreed to withdraw its posts and military from locations north of the North Platte and to retain them only at locations south of this river (Ibid:773-774). Article 12 promised that no portion of the reservation held in common by the parties to the treaty would be relinquished unless "consented to and signed by" three-quarters of the adult male population (Ibid:774). Articles 13 and 14 contained provisions to support the acculturation of the tribes, while 15 secured the promise that once agency buildings were constructed the tribes would make the reservation their permanent home (Ibid:774). Article 16 stipulated that all lands north of the North Platte River and east of the summit of the Big Horn Mountains would remain unceded Indian territory and that "no white person or persons shall be permitted to settle upon or occupy or will be allowed to settle on the same; or without the consent of the Indians first had and obtained, to pass through the same" (Ibid:774-775). It also promised that the military posts in the area would be abandoned and that the road to Montana would be closed (Ibid:775). Finally, Article 17 stated that the provisions of the 1868 treaty would abrogate all prior treaties and agreements between the two parties (Ibid:775).

Under the terms of this treaty [15 Stat. 635], which was finalized on the 29th of April in 1868, a reservation was established for the Sioux, the northern Arapaho, and other tribal parties these two tribes agreed to admit (Kappler 1903:2:770-775). Besides the various bands of Teton Lakotas, the Yanktonnai Dakotas and Santee Dakotas were also included under its provisions. Under the treaty all Sioux territory east of the Missouri, except for lands on established reservations, was ceded to the United States under Yanktonnai protest (DeMallie 2001:781). Although most of the upper Yanktonnai eventually settled on what was then known as the Fort Totten Reservation (now Spirit Lake Reservation) after its establishment in 1867, the southern Yanktonnai either remained at Crow Creek on the Missouri, where they received a reservation under an executive order in 1879, or moved to the Grand River Agency (now Standing Rock) (DeMallie 2001:782-783).

Later in the year, another treaty [15 Stat. 655] was signed with the northern bands of the Arapahos and Cheyennes giving them permission to remain on what was then called the Great Sioux Reservation or establish residence on the reservation established for their southern brethren under the terms of the Medicine Lodge Creek Treaty [15 Stat. 593] (Kappler 1903:2:778-781). The Northern Cheyennes and Arapahos' interests in the Black Hills were covered in the Fort Laramie treaties in two ways. In the treaty with the Sioux [15 Stat. 635], they were included under the provisions of Article 2. In the second Fort Laramie Treaty [15 Stat. 655], they were given a choice either to make their permanent home on a portion of the lands set aside for their southern relatives in Oklahoma under the terms of the Medicine Lodge Treaty, or take up residence within the territory designated and set aside for the Sioux as negotiated on April 29, 1868 (Kappler 1903:2:778-781; Powell 1981:2:762-768). Although many Northern Cheyennes, including the followers of Little Wolf, were never parties to either of the Fort Laramie treaties, those who were believed they had legal rights to the Hills under the terms of both 1868 Fort Laramie treaties (Powell 1981:2:768-770; Dusenberry 1955:24-25; Marquis and Limbaugh 1973: 17n18).

In 1869, Congress ratified the Medicine Lodge Creek and Fort Laramie treaties but not without contentious debate (Price, C. 1996:84-85). The Fort Laramie Treaty not only secured for the Sioux much of their aboriginal domain, including the Black Hills, but it also guaranteed that these lands could not be trespassed on by outsiders without their expressed consent. Also of great significance, it mandated that no land within the boundaries of the reservation, which again included the Black Hills, would be ceded without the signed consent of three-quarters of the adult male population. But even as the treaty was being ratified, the federal government was under pressure to amend the terms of the treaty in order to make the Black Hills available for European American settlement and development (Lazarus 1991:67-70).

E. Black Hills Agreement, 1875 to 1877

Under mounting pressure from the miners, merchants, and settlers who colonized the Black Hills, and in the face of growing resentment and hostility from the tribal nations who still owned them, the government began another round of negotiations in 1875 with the Sioux, Cheyennes, and Arapahos to relinquish the Hills. Only this time the negotiations would not be concluded in a treaty but an agreement.[5] As pointed out in Chapter Five, the first round of negotiations, which

[5] Unlike treaties, the U.S. Senate and House of Representatives must pass agreements. Treaties only require passage by the Senate. Some scholars have argued that the move to agreements reflects a change in the political posture of the U.S. government towards tribes. This may be true, but agreements still hold the same legally binding contractual obligations as treaties.

began on September 4, 1875, failed. Even though they were reconvened a few weeks later, it was apparent that a consensus could not be reached among the adult male representatives of the tribes present at the negotiations. By October of 1875, the federal government abandoned its efforts to negotiate an agreement for the Black Hills and the commissioners returned to Washington, D.C. knowing they would be unable to secure the signed consent of three-fourths of the adult male population for any lease or sale. A few months after the Battle of Little Big Horn, the government authorized another commission to negotiate a settlement for the Black Hills. In August of 1876, George Manypenny, the chief negotiator, recommenced the deliberations (Olson 1965:224-226). Two months later on October 27th, without the required consent of three-quarters of the adult male population, the negotiations were concluded when several influential Sioux, Cheyennes, and Arapahos signed the agreement. Four months later, the agreement became law with the passage of a Congressional Act on February 28, 1877.

From the moment of its passage, nearly every section of the statute became a subject of controversy. The statute contains the following provisions. Under Article 1, new boundaries were created for the Sioux Reservation that did not include the Black Hills. These boundaries were described as commencing:

> at the intersection of the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska: thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South branch of Cannon Ball or Cedar Creek; and the northern boundary of their said reservation shall follow the Said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River (*quoted from* Lazarus 1991:458).

All of the lands outside this boundary were ceded to the United States, all rights to hunt in these areas were relinquished as well, and Article 16 of the 1868 treaty, covering unceded Indian Territory, was abrogated (Lazarus 1991:457-461). Article 3 permitted the United States to build no more than "3 wagon or other roads" across the new reservation. Article 4 provided that all annuities, subsistence, and supplies from this agreement, the 1868 treaty, and any future act of Congress would be distributed at points along the Missouri River (Ibid:458). Articles 3 to 11 covered the conditions of delivering annuities, resettling bands on the reservation, and making allotments for individual heads of families. These articles also stipulated the terms for providing support in agriculture, education, government and subsistence until the tribes became self-sufficient, and they set forth provisions for enforcing morality and for taking an annual census (Ibid:459-461). Some of these provisions, however, duplicated what the government had already offered to the Sioux under the Fort Laramie Treaty of 1868. Importantly, there was no monetary settlement for the 7.7 million acres of land ceded by the act.

Curiously, however, Article 12 of the 1868 Treaty [15 Stat., 635] was not abrogated, leaving the Sioux with a significant legal avenue to challenge the 1877 Act. Since three-quarters of the adult male population never signed the 1876 document on which congressional action was taken and the Black Hills Act of 1877 passed, Congress had illegally overridden its own duly ratified treaty law. The failure of the U.S. government to gain the required consent of the Sioux, Northern Arapahos, and Northern Cheyennes to change the terms of the 1868 Treaty, and its failure to offer adequate compensation for the illegal taking of the Black Hills, placed the Hills in an entangled and protracted history of litigation. To this day, even though the question of the legal

standing of the lands that make up the Black Hills has been settled, at least from the perspective of the U.S. judicial system, the historical and cultural claims of the Sioux, Cheyennes, and Arapahos to these lands still remain unresolved. And there is not likely to be any closure on this issue in the near or foreseeable future.

F. The 1889 Agreement

If the 1877 Agreement had not been enough to undermine what little faith the Sioux had in the honesty and integrity of the United States government and its representatives, the proceedings surrounding the break-up of the reservation established by the 1877 Act, which began five years later in 1882, subjected them once more to the indignity of having to surrender more of their lands under further duress and deception (Lazarus 1991:107-112). Although three-quarters of the adult male Sioux population eventually and reluctantly signed an agreement in 1887 for the creation of five smaller reservations and the cession of all remaining lands, they did so with the explicit understanding that it would not abrogate any of the rights remaining to them under the Fort Laramie Treaty of 1868 [15 Stat., 635]. The passage of the 1889 Act, and the resulting loss of additional lands exacerbated internal divisions among the Sioux and reinforced their resolve to reclaim the Black Hills (Ibid:111-112).

II. THE SIOUX BLACK HILLS CLAIM AND IT'S ADJUDICATION

Until August 15, 1946, when President Harry S. Truman signed the Indian Claims Act (60 Stat. 1049), tribes pursued their claims before the U.S. Court of Claims once they secured a special jurisdictional act from Congress. The process of getting a hearing on a case before the U.S. Court of Claims was subject to legal obstacles and delays. There was no assurance of Congressional support in getting a jurisdictional act passed, much less receiving a favorable hearing in court. Indeed, as Edward Lazarus (1991:184) argued:

> The Court of Claims consistently read jurisdictional acts narrowly and almost universally refused on technical grounds to hear cases based on fraud, duress, mistake of fact, or other questions of treaty validity. The process became so cumbersome that Congress began to deliberate on other alternatives, not only because the number of tribes seeking jurisdictional acts was becoming unwieldy but also because of the process itself was unfair.

In the 1930s, Congress began to consider the formation of a special judicial body to hear Indian claims cases (Lurie 1978:97-110; Lazarus 1991:184), and fifteen years later, it passed into law the act governing the formation of the Indian Claims Commission (hereafter abbreviated as ICC). Congress granted the commission the right to hear two sorts of cases. One was based on issues of equity, wherein treaties, contracts, and agreements between the United States and tribal claimants were made under 'fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity' (Lazarus 1991:185). The other addressed issues of fairness and covered 'claims based upon fair and honorable dealings that are not recognized by any rule of law or equity.' (The act also included provisions for the formation of an "Investigation Division" that would give tribes assistance in assembling the necessary evidence to bring before the ICC (Ibid:185).

The overall history of the ICC has yet to be written, although judging by the evaluations of particular cases, including the Sioux's Black Hills claim, it would have to be argued that it

obstructed as much as it advanced the process by which tribes might received some fair measure of justice for their claims (Sutton 1985). As Edward Lazarus (1991:262-263) wrote:

> Congress had created the commission precisely because the claims court, through uncharitable interpretation of special jurisdictional acts, had frustrated efforts to resolve tribal grievances on their merits. Despite this congressional intent, the commission had exacerbated the problem. The result was a tribunal even stingier in its legal rulings than the court whose conservatism it had been designed to circumvent.

Because of the ICC's narrow interpretation of its mandate, many cases it heard ultimately ended up in the U.S. Court of Claims where the rulings were generally more favorable to tribes (Ibid: 263). One of the most important areas where there was a significant difference in rulings had to do with the recognition of aboriginal property rights. While the ICC rarely ruled in favor of aboriginal title to the land, the U.S. Court of Claims took the position that tribes 'held property rights in the lands under their control simply as a consequence of their prior occupancy, regardless of any government recognition' (Ibid:263). By the 1960s, there was increasing dissatisfaction in Congress over the ICC's methods and rulings, and in 1970, it was closed (Ibid:264).

The Sioux's Black Hills claim represents a classic illustration of the problematic nature of the legal process under which tribes sought redress from the U.S. government for the illegal taking of their lands. At every step of the way in its sixty-year history, the claim was obstructed by delays, technicalities, and hairsplitting legal interpretations. Although the grounds on which the Sioux claim was pursued shifted over time, the two central questions underlying the claim were whether the Black Hills were improperly taken by the U.S. Government and whether conscionable consideration had been given for their taking (Wilkins 1997:226-227). The unwavering position of the Sioux Nation was that the Hills had been illegally seized and taken in the absence of fair compensation, while the U.S. Government's case rested on proving that it had acted in an honorable and fair manner in terms of its own treaty law.

Because this landmark case is so important and concerns the lands on which Wind Cave National Park stands, it needs to be given some consideration here. Three different but related questions will be addressed. First, what were the major court cases and rulings that led to the final Supreme Court decision on the Sioux's Black Hills claim? The complicated and protracted legal struggle of the Sioux and their counsel to reach a settlement on the Black Hills' claim is covered in great detail by Edward Lazarus in his book *Black Hills, White Justice* (1998) and in a number of law review articles (Hanson, S. 1980; Shreves 1981; Pemberton 1985; Pommershein 1988), and it does not need to be reiterated here except to highlight and summarize chronologically the benchmark legal motions and rulings in what would become the longest running Indian claims case in U.S. history. Second, what was the legal theory behind the decision that led to the largest Indian land claim settlement in the history of the ICC? For some understanding on this question, reliance is placed on the work of Professor David Wilkins (1997), a political scientist, who is widely considered to be the leading expert on the history of Supreme Court decisions affecting Indian tribes. And finally, why did the Black Hills claim fail to reach a satisfactory conclusion for the two parties, namely, the Sioux and the United States government? In addition to the sources referred to above, Alexandra New Holy's recent article, "The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity," in the *Oklahoma Law Review* (1998) is especially helpful in the discussion of this question.

A. The Historical Chronology of the Case

The Sioux Nation claims case on the Black Hills took sixty years to reach a resolution, starting with the passage of a special jurisdictional act by Congress in 1920 that authorized the U.S. Court of Claims to consider a motion on the matter and ending with the final judgment of the U.S. Supreme Court in 1980 that led to a monetary settlement of more than 106 million dollars for the illegal seizure of the Black Hills. This sixty year history is divided into seven segments, which cover the events that led the Sioux to pursue a claim, trace the major court holdings in the case, and describe unsuccessful litigation pursued by the Sioux after the Supreme Court handed down its ruling.

1. The Beginnings of the Claim: 1903-1920

Hardly had the seizure of the Black Hills been ratified by Congress in 1877 when leaders from the Lakota, Arapaho, and Cheyenne nations petitioned to see the President of the United States over the irregularities that surrounded the proceedings of the Black Hills Commission in 1876 (Price, C. 1996:157-158). The date when the Sioux and their allies first attempted to organize and protest the seizure of the Black Hills is not known, although John Brennan, the agent at Pine Ridge, reported that a group of over three hundred older leaders started to meet and press their claims at the agency in 1891 (Lazarus 1991:119-120).

Little more than a decade thereafter, when many of the older leaders began to organize around the Black Hills question, a meeting was arranged in 1903 with Eben W. Martin, the Senator from South Dakota, to discuss Sioux claims regarding the Black Hills. This meeting not only included many of the younger and more educated leaders of the Sioux nation, but it also involved representatives from the Northern Cheyenne and Northern Arapaho tribes. At this meeting, Red Cloud reiterated what he told the commissioners sixteen years earlier and complained that his people were not receiving what he believed had been negotiated in 1876. As Edward Lazarus (1991:121) wrote, "Red Cloud understood perfectly that he had been cheated, but he still did not know just how in terms that were either accurate or that whites could comprehend." Some of the younger and boarding-school educated Lakota did have a sense of this, including Edgar Fire Thunder who was cognizant of the fact that three-quarters of the tribe had never consented to or signed the 1876 agreement (Ibid:122). Martin counter-argued, however, that this agreement was valid not only because the leaders who signed represented three-quarters of the adult male population, but also because the government had already compensated the Sioux with more than enough in food and provisions for the taking of the Black Hills and other lands under Article 19 of the 1889 Agreement. American Horse then challenged Martin by arguing that the later agreement, governing the break-up of the Sioux reservation, had nothing to do with the Black Hills or any other earlier treaty to which the Sioux were a party (Lazarus 1991:122-123).

Three years later in 1906, another boarding-school educated Sioux, Charles Turning Hawk, sought counsel from the Washington, D.C. attorney, R.V. Belt, who advised the Pine Ridge Sioux that any claim for the Black Hills had to revolve around the federal government's failure to secure the signatures of three-fourths of the adult male population, but even then, there was no guarantee that a case would lead to a judicial ruling in their favor. Nevertheless, the Pine Ridge Sioux Tribal Council chose Belt to oversee their legal affairs on the matter. He was never retained, however. At this point in history, the Indian Bureau still reserved the prerogative to determine who would represent tribal interests, and tribes did not retain the right to sue the government independently (Lazarus 1991:123-125) As defined by congressional legislation enacted in 1873,

tribes were required to secure special jurisdictional acts from Congress in order to press their land claims in the U.S. federal court system (Lazarus 1991:124-126).

In 1911, five years after the Pine Ridge Sioux first sought legal counsel, representatives from the various Sioux, Northern Arapaho, and Northern Cheyenne tribes, who were either parties to the 1876 Black Hills Agreement, or who were present at the deliberations, met at the Cheyenne River Reservation for what had now become an annual gathering on the issue of the Black Hills "treaty." At this meeting, a formal resolution was passed that claimed the treaty was executed illegally because it had not secured the required signatures of three-quarters of the adult male population. Also present at this meeting was the state of South Dakota's highly respected historian, Doane Robinson, who became sufficiently convinced of the legitimacy of the tribes' claims to write about them in an article that appeared in Deadwood's *Pioneer Times*. Needless to say this brought about a rash of rebuttals from government officials denying the legitimacy of any such claim (Lazarus 1991:130-131).

Without the financial support of the Bureau of Indian Affairs, the Sioux raised their own monies to travel to Washington, D.C. and lobby Congress to get a jurisdictional act passed so they could pursue their claim in court. They also began to secure depositions from tribal elders who had been at the 1875 and 1876 proceedings. All of these elders concurred that they and others who participated in the negotiations were under the impression that they only signed a lease for the Hills not a settlement for their outright sale (Lazarus 1991:137). It would take many more years for Congress to pass the Sioux Jurisdictional Act on June 1, 1920, a statute allowing them to pursue their Black Hills case in court (Lazarus 1991:138).

In the meantime, the Northern Arapahos and Northern Cheyennes were also trying, but less successfully, to gain legal standing to pursue their case through the federal court system. In the same year that the Sioux received a jurisdictional act to pursue their claim, Northern Cheyennes and Northern Arapahos met at a joint meeting on December 15-17, 1920 to propose their own separate claim. The next year the Northern Arapahos formally withdrew themselves from any association with the Sioux claim (Fowler 1982:327n3), and the following year, 1922, the chairman of the Northern Arapaho Business Council, Henry Lee Tylor, tried to get federal support to send an Arapaho delegation to Washington, D.C. to seek some sort of redress on their Black Hills claim (Fowler 1982:134). In 1926, Congress apparently authorized the Arapahos and Cheyennes to intervene in the Sioux case before the U.S. Court of Claims, but over the next decade, they decided not to do so (U. S. House of Representatives 1939:77). Nonetheless, the Northern Arapahos were still optimistic about gaining the necessary government support to pursue their claim independently, and in 1939, they appealed to the U.S. Senate for passage of a separate jurisdictional act to get a hearing on the Black Hills before the U.S. Court of Claims, but this effort appears not to have moved beyond the hearing stage (U.S. House of Representatives 1939, 1940). By the 1940s, it was apparent that their efforts would not be rewarded (Fowler 1982:165, 173). Although the Northern Arapahos and Northern Cheyennes were parties to an ICC claim over lands inside the border of their territory as designated in the 1851 Fort Laramie Treaty, there is nothing we could find to suggest that they attempted to pursue a separate ICC claim relating to their proprietary interests in the Black Hills.

2. The Case Before the U.S. Court of Claims: 1921-1949

A year after the Sioux received their jurisdictional act, the federal government retained a group of prestigious New York attorneys to review the Sioux's case (Lazarus 1991:140). In their expert legal opinion, the jurisdictional act, which the Sioux had fought so hard to secure, was

weak because it did not empower the Court of Claims to consider the Sioux's case on the moral grounds they wished to pursue it. Moreover, the lawyers argued that even if a decision had been favorable to the Sioux, the award would be too small to merit pushing the case any further. They also advised them against the value of their claim, asserting that "an Indian tribe's rights in the land were not those of outright ownership but rather similar to the rights of a 'tenet for life'" (Ibid:140-141). These attorneys also asserted that even though their 1868 treaty gave them an absolute and undisturbed right of occupancy to the Black Hills, it did not grant them outright ownership. Finally, even if the court accepted life tenancy as a form of ownership, they argued that any expenditure the government claimed it had spent on the Sioux would far outweigh any award the Sioux might conceivably win (Ibid:141). In their expert opinion, the Sioux needed to return to Congress to obtain a new or amended jurisdictional act, excluding government offsets and authorizing the U.S. Court of Claims to inquire into the legality of the 1876 agreement. The attorneys the government retained withdrew themselves from the case, leaving the Sioux without legal representation (Ibid:142).

In their search for new legal counsel, the Sioux found themselves embroiled in bitter disputes over what course of action they should take on their claim. No less divided in deciding how to pursue the claim were the attorneys the Sioux were attempting to retain. On December 21, 1922, the lawyers reached an agreement, but in the meantime, one of them had dropped out of the case (Lazarus 1991:132-145). The lead attorney for the Sioux, Ralph Hoyt Case, was confident that the Sioux's original jurisdictional act was adequate enough to take their claim to court, but he was also mindful of the fact that the only redress the Sioux could hope to receive from the Court of Claims was a monetary settlement (Ibid:147). In his initial meetings with the Sioux, Case informed them that they had no hope of regaining any of their lands in the Black Hills because the Court of Claims was only empowered to make a judgment for restitution on monetary grounds. He also told them that the federal government had the constitutional right of eminent domain as long as it provided fair compensation for its takings (Lazarus Ibid: 147-148). From Case's perspective, the key issue in the case was not that the government had taken the Hills from the Sioux, but that it had not paid them for the seizure (Ibid:147-149). Although Edward Lazarus (Ibid:150) claims the Sioux had not anticipated anything different at the outset of their long legal struggle, and merely desired to get the 'best price' for the Hills as expeditiously as possible, it is hard to know what most of them really expected or even wanted at this point in time.[6]

On May 7, 1923, Case filed the Sioux's claim with the U.S. Court of Claims on the grounds that the United States had not given the Sioux adequate compensation for a Fifth Amendment taking of lands guaranteed to them in the 1868 Fort Laramie Treaty (Lazarus 1991:169). The claim was divided into three different categories of land, which included under Class A the lands of the Black Hills and their surrounding area. These lands totaled 7,345,157 acres, which Case valued at $172 million plus interest from the date of taking (Ibid:158). The claim was accompanied by a five hundred page "Statement of Fact," in which Case meticulously presented the testimonies[7] of Sioux elders who were present at the 1875 and 1876 negotiations that led to the seizure of the Black Hills. Over the years, according to Lazarus (Ibid:175, 191), this document

[6] Like most other Americans in the 1920s, and even today, few Sioux had the necessary legal background and expertise to take an informed stand on their rights and options on this matter.

[7] These testimonies revealed in varying, and at times inconsistent, ways the Sioux were misled and deceived by the government during the negotiations in 1875 and 1876 (Lazarus 1991:175, 191). The illegality of the so-called 1877 Agreement was raised not only by the Lakotas but also by some of the whites that attended the deliberations. Ben Arnold (in Crawford and Waggoner 1999:209-210), for one, knew the terms of the 1868 Fort Laramie treaty and what had been said in the negotiations in the 1875 and 1876 negotiations. He revealed that the original offer to the Sioux in 1875 was a land lease, not an outright sale, and that the negotiations in 1876 took place under considerable duress.

took on a sacred status among the Sioux, and while it clearly reflected the moral sentiments and views of the Sioux litigants, it did not stand up in court against government challenges that it was a record of hearsay without any objective grounding (Ibid:175).

After eighteen years of legal maneuvering, delays, and audits, the oral arguments on the Sioux case were heard before the U. S. Court of Claims in October of 1941 (Lazarus 1991:150-175). Eight months later on June 1, 1942, the court dismissed the case (*Sioux Tribe of Indians vs. The United States* (97 Ct. Cl.]) on the grounds that it did not have the jurisdiction to decide a moral claim. The court, however, held conflicting opinions that led to inconsistent readings of its ruling by later courts. In its "Finding of Facts," the court rejected the central thesis of the plaintiffs that the Sioux had been coerced into signing the 1876 Black Hills Agreement. It determined that the government had conducted itself properly given the circumstances. This led a 1975 court to rule that the case had been adjudicated. Yet, in 1974 and 1979, two other courts took the position that the 1942 court holding had explicitly dismissed the case and refused to give a legal opinion on what was construed as a moral issue (Ibid:175). More specifically, the 1942 court stated that it was not given authority under the provisions of the Sioux Jurisdictional Act to rule on whether the Black Hills were seized as a Fifth Amendment taking, and therefore, it did not have jurisdiction to decide whether adequate consideration was given under the 1877 Agreement (Ibid:179-180). Seven years later, Sioux legal counsel appealed the case to the Supreme Court, but the high court declined to review it (Ibid:188).

3. Case Before the Indian Claims Commission: 1950-1956

The following year on August 15, 1950, Ralph Case, the Sioux's principal attorney, filed the Sioux claim before the Indian Claims Commission. In his thirty-five page petition to the commission, the Fifth Amendment legal theory he had originally advanced in the case before the U.S. Court of Claims was abandoned; and instead, his argument rested solely on the claim that the compensation paid to the Sioux under the 1877 Act was inadequate and "unconscionable." In other words, the Sioux had not received just consideration for the taking of their lands by the government (Lazarus 1991:191). The justice department's counsel, of course, vigorously denied the allegations that the government had coerced, misled, or acted unfairly in its dealings with the Sioux on this matter (Ibid:193-195).

On April 5, 1954, the ICC in *Sioux Tribe of Indians v. United States* (2 Ind. Cl. Comm:646) denied the claim and sided with the government that the Sioux had not demonstrated unconscionable consideration under the 1877 Agreement. Quite the contrary, the ICC in its "Findings of Fact and Opinion" wrote that under the circumstances the federal government treated the Sioux fairly and provided them just compensation (2 Ind. Cl. Comm:673, 682-683). In reaching their decision, the ICC completely sidestepped Article 12 of the 1868 Fort Laramie Treaty, requiring permission of three-quarters of the adult Sioux male population to amend any of its provisions. Since the necessary signatures were not secured in the 1876 agreement, the government taking was theoretically illegal. This important issue, however, was never ruled on because the Sioux's attorney, Ralph Case, had not pursued it in the claim before the ICC (Lazarus 1991:204-205). A year later on March 11, 1955, the ICC denied the Sioux's petition for a rehearing, and seven months later it was returned to the U.S. Court of Claims.

Once again, on November 7, 1956, the Court of Claims affirmed the dismissal of the Sioux claim in *Sioux Tribe of Indians, et al. v. The United States* (146 F. Supp:229). Siding with the ICC and the Department of Justice, the court ruled that the Sioux had received conscionable consideration under the terms of the 1877 Agreement. It also argued that even though the govern-

ment had breached the 1868 treaty, the Sioux had no legal standing to make a claim against the United States and no basis for recovery either (Lazarus 1991:211-212).

4. The Second Time Around: 1957-1974

Realizing that their attorney, Ralph Case, had botched their case, the Oglala Sioux Tribe requested that one of their own tribal members, Helen Peterson.[8] the Executive Director of the National Congress of American Indians, seek other legal advice. A year later she recommended the tribe seek new counsel and a reconsideration of their claim (Lazarus 1991:211-215). On October 4, 1957, the Sioux's new legal counsel, Sonosky, Schifter, and Lazarus, filed a motion before the Court of Claims to vacate its 1956 ruling on the grounds that the tribe's former attorney, Ralph Case, was incompetent (Ibid:228-229). The response of the government on the Motion to Vacate was predictable, asserting that the problem had not been the Sioux's legal representation but rather the lack of merit in their case (Ibid:233).

On November 5, 1958, the Court of Claims (182 Ct. Cl:912) granted the plaintiff's motion, returning the case to the ICC to determine whether there were sufficient grounds to reconsider it. After two weeks, the ICC (33 Ind. Cl. Comm:151, 152, 153) gave the order to have the case re-opened (Lazarus 1991:234-235). Two years later, on November 4, 1960, the Sioux filed their amended claims with the ICC. Unlike their former counsel, the new attorneys divided the case into two petitions, one dealing with the lands surrendered under the Fort Laramie Treaty of 1868 (Docket-74A), and a second covering lands taken in the 1877 Black Hills Agreement (Docket 74B) (Ibid:238). In relation to the second petition, the Sioux claimed that the land surrendered under the 1877 Agreement constituted a Fifth Amendment taking and that the United States had not given them adequate compensation for this seizure (Ibid:204). The government objected to the Sioux's petitions on the grounds that they represented new claims, but the ICC denied the government's objections (Ibid:242).

Following its earlier dilatory tactics, the government delayed its response to the plaintiff's petitions, raised dubious technical issues, and moved to dismiss the claim entirely. Again, the ICC denied the government's motions (Lazarus 1991:242-244). The new trial started on June 25, 1962 with the plaintiffs presenting 535 exhibits with over 10,000 pages of evidence to prove Sioux title to the 1868 Fort Laramie Treaty lands (Ibid:248-249).[9] By February 1964, all papers in the case had been filed (Ibid:260), but it was not until May of 1966 that the ICC ordered the Sioux claims be tried separately: 74A was assigned to the 1868 Fort Laramie Treaty claims, and 74B was the docket for claims relating to the Black Hills. The commission also required the government to reply to the tribe's amended Black Hills petition (Ibid:264). As Lazarus (Ibid:264) wrote: "The sleeping giant was about to be awakened."[10]

After two more years had passed, the ICC set down for determination three questions:

> First, what lands and rights did the United States acquire under 1877 Act? Second, was there any consideration for the acquisition by the United States of these lands and rights, and if so, what constituted that consideration? Third, if there was no consideration (an agreed-upon

[8] She was one of the members of the Oglala Sioux Tribe of Cheyenne ancestry.

[9] Copies of these papers are held on microfilm in the collections of the South Dakota Historical Society, and these were reviewed as part of the research underlying this report.

[10] Although Lazarus' use of this popular expression is no doubt coincidental, it is worth noting here that the Black Hills have long been associated with a figure of gigantic stature in Sioux traditions (see, Chapters Thirteen and Fourteen for a detailed discussion of this association).

price) was there any payment (compensation for a unilateral appropriation) to the acquisition? (*quoted from* Lazarus 1991:267).

Earlier in the same year, 1968, plaintiffs requested the commission to consider these very same questions (Ibid:267).

On March 16, 1969, Sioux counsel filed two briefs. One of these defined Sioux rights to lands that were lost under the 1877 agreement, including the Black Hills (Lazarus 1991:267). In this brief, the attorneys claimed that the United States had not provided adequate consideration for the relinquishment of Black Hills lands under the 1877 Agreement, and they further asserted that the compensation the tribe received represented a gratuity rather than a payment for the sale of the land. The defense objected to the plaintiffs' assertions and argued that government compensation represented adequate consideration, adding that it had paid the Sioux a total of $52,139,223.93 between 1877 and June 30, 1951, and that, in addition, it had transferred 900, 000 acres of land back to the Sioux. It also raised the defense of res *judicata*[11] (Ibid:156).

On February 15, 1974, the ICC handed down its ruling in *Sioux Nation of Indians v. United States* (33 Ind. Cl. Comm. 1974:151). The first principal holding ruled the United States had taken the Black Hills under the 1877 Agreement in violation of the 5th Amendment, and the second held the land appropriated under this act was worth 17.1 million dollars (33 Ind. Cl. Comm. 1974:217, 357; Lazarus 1991:317). The ICC justices further argued that the Sioux claim rested on moral rather than legal grounds; and therefore, it stood outside the scope of the 1920 Sioux Jurisdictional Act and had not been adjudicated as the government claimed in the 1942 court (Lazarus 1991:319). Thus, the ICC rejected the government's *res judicata* claim (33 Ind. Cl. Comm. 1974:209; Lazarus 1991:319). The ICC also found that the government had made "no effort to give the Sioux the full value of their land" and were required to offer fair compensation for the taking (33 Ind. Cl. Comm. 1974:216-220; Lazarus 1991:323). In other words, the 1877 Black Hills Agreement had constituted an illegal taking as defined by the Fifth Amendment of the U.S. Constitution.

The ICC also held that the time of taking was November 17, 1875, the date President Ulysses S. Grant secretly ordered the Army to stop upholding Sioux rights as set forth in Article 2 of the 1868 Fort Laramie Treaty, not the later date of 1877 when the act relinquishing Sioux title to the lands was passed by Congress (33 Ind. Cl. Comm. 1974:227). The commission awarded the Sioux $17.1 million for a Fifth Amendment taking of the Black Hills and $450,000 for the gold seized by the settlers. It also held the government liable for paying interest on the entire 17.5 million in the amount of 5% per year from the 1875 date of taking (Lazarus 1991:359). The "downside" of the ICC ruling, according to Lazarus (Ibid:324), was the government was allowed to collect its offsets from the award; it was able to claim reimbursement for the expenditures it had made on behalf of the Sioux in fulfilling any obligations it incurred under the 1877 Act.

Since the government's credit would substantially reduce the monetary settlement the Sioux would actually receive, the attorneys turned to Congress to seek an amendment to the ICC Act which would bar offsetting, that is, exclude food, rations, and provisions from the category of allowable offsets the government was able to deduct from a claims' settlement (Lazarus 1991:330-332). The amendment was brought before the Senate by James Abourezk, the Senator from South Dakota. On May 28, 1974, it was passed by the Senate (S.3007) and approved by the

[11] *Res judicata* bars a rehearing on an issue previously adjudicated in a civil court. It was the government's position that the Fifth Amendment taking had been decided by the 1942 Court of Claims, and therefore, the issue could not be retried.

House (H.R. 16170) on October 15, 1974. President Gerald Ford signed the amendment into law on October 27 (Ibid:332-336).

5. Back to the U.S. Court of Claims: 1975-1977

Meanwhile, the United States appealed the ICC's 1974 rulings, and once again, it was referred to the Court of Claims on the grounds of *res judicata* and *collateral estoppel*.[12] On June 25, 1975, in *United States v. Sioux Nation* (207 Ct. Cl. 1975:234), the government asked the court to consider whether the Black Hills were relinquished by the power of eminent domain or by "the course of unfair and dishonorable dealings not amounting to a constitutional taking." In this case, the Court of Claims affirmed the ICC award for 17.5, but denied any government liability for interest on that amount, stating that the Sioux's Fifth Amendment Claim was barred by *res judicata* (207 Ct. Cl. 1975:234). In reaching this decision, the court argued that while it did not agree with the 1942 decision, it was compelled by the technical requirements of the law to rule that the 1942 court had decided the Fifth Amendment question (Lazarus 1991:344). In its evaluation of the historical record, the court found the government's dealings with the Sioux reprehensible, but ruled that the Sioux could only seek compensation on the "ground of dishonorable dealings." This meant an award for 17.5 million, not an added 85 million in interest. On December 4, 1975, the Supreme Court denied a petition from Sioux counsel for *a certiorari*, so the maximum allowable recovery on the claim remained at 17.5 million (Lazarus 1991:344-345).

6. On to the Supreme Court and the Final Judgment: 1978-1980

Meanwhile, Sioux counsel tried to get Senator Abourezk to introduce another amendment to the original 1946 ICC Act, whereby Congress would instruct the ICC to consider the Black Hills claim solely on its merits without regard to the defense of *res judicata* and *collateral estoppel* (Lazarus 1991:347). The statute (92 Stat. 153) was signed into law by President Jimmy Carter on March 13, 1978 (Ibid:365), and it gave the Sioux another legal reprieve -- the chance to finally prove their claim of a Fifth Amendment taking. The Black Hills claim was argued before the U. S. Court of Claims for the fourth time on November 28, 1978. On June 13, 1979, the court handed down its final ruling in *United States v. Sioux Nation*, in which it affirmed the 1974 ICC ruling that the Sioux were entitled to $17.1 million plus interest at 5% from the date of taking, determined by this court to be February 1877 (the date the Black Hills Act was passed into law) and to $450,000 for the gold stolen from the Hills but without interest on this amount for a grand total of 106 million dollars (220 Ct.Cl. 1979:442; Lazarus 1991:373-375).

On October 17, 1979, the Solicitor General filed a petition for a writ of *certiorari*, asking the Supreme Court to overturn the 1979 Court of Claims decision, and a month later on November 21, 1979, the high court considered the petition for *a certiorari* in the Black Hills Claim as United *States v. Sioux Nation of Indians, No. 79-639* (Lazarus 1991:378-379). Oral argument for case began on March 24, 1980 (Ibid:386)**,** and on June 30, 1980, in *United States v. Sioux Nation of Indians* (448 U.S. 371, 100 S.Ct. 1980), the Supreme Court affirmed the 1979 Court of Claims ruling, voting 8 to 1 in favor of the decision. Justice Blackmun wrote on behalf of the majority in the case, while Justice Rehnquist presented the dissenting opinion.

[12] *Collateral estoppel* refers to a situation where an issue of fact cannot be relitigated between two parties once it has been decided upon in a valid legal judgment.

7. The Legal Aftermath of the Supreme Court Decision

After sixty years, the long legal battle was seemingly over. The victory was bittersweet, however. Even though the Sioux's attorneys had won the largest Indian claims award for their clients, the political grounds on which the claim was being staked had shifted. The Sioux were no longer interested in a monetary settlement for the Black Hills; they wanted their illegally confiscated land returned.

One day after the Supreme Court decision, Mario Gonzalez, a Sioux attorney from Pine Ridge, sought an injunction against Sioux counsel to prevent them from pursuing a monetary claim. The complaint asserted that the lawyers in the Sioux Nation case did not represent the Oglala Sioux Tribe (Lazarus 1991:403, 408). Two weeks later, on July 18, Gonzalez filed a case with the Federal District Court in South Dakota, requesting, among other things, the return of the Black Hills to the Sioux. He argued that the 1877 Black Hills Agreement was null and void on the grounds that the U.S. had seized the Black Hills for private rather than public purposes, thereby violating the Fifth Amendment. The tribe sought the return of their proprietary rights to the Hills and monetary damages for the extraction of minerals. He moved to stop any payment on the Sioux Nation settlement to the plaintiffs and their attorneys (Ibid:408-409; Pemberton 1985:310). A year later, the court dismissed the case and ruled in *Oglala Sioux Tribe v. United States* [650 F.2d] that it lacked jurisdiction over such matters. It also declined Gonzalez's move to appeal the case (Pemberton 1985:310). Subsequently, the Oglala Sioux Tribe sued the Homestake Mining Company to revoke their title to five acres of property in the Hills, to secure damages from the company's trespass on Oglala land, and to prevent the company from furthering its operations (Pemberton 1985:311, Lazarus 1991:412). In 1983, the court dismissed the case of *Oglala Sioux Tribe v. Homestake Mining Co.* [722 F.2d] on the grounds that it had disposed of the issues raised in a previous ruling on the Oglala Sioux Tribe v. United States. While Edward Lazarus (Ibid:412-413) dismissed Gonzalez's legal efforts as "frivolous," Richard Pemberton Jr. (1985:312) took a more measured view of the situation and argued that the United States was not legally equipped to address the issues of "real importance to the Oglalas and other Sioux people." As a result, and in the end, the court system served as no remedy at all for the Sioux in their quest for justice on the matter of the Black Hills.

B. The Legal Interpretation of the Case

Throughout its long history, the Sioux Nation's Black Hills claim never really pivoted, as some other Indian claims cases have, on the issue of whether or not the Sioux had property rights and interests in the Black Hills. These had been acknowledged in two treaties with the United States. First, the Fort Laramie Treaty of 1851 clearly established that the Black Hills were located within the territorial boundaries of the Sioux Nation, and second, under the terms of the 1868 Fort Laramie Treaty, the Black Hills were included within the lands set aside for the exclusive and undisturbed use and occupancy of the Sioux and any other tribes who they permitted to reside there. Sioux rights and interests in the Black Hills prior to 1851 were carefully documented by ethnohistorical evidence assembled for the Justice Department by Wesley Hurt (1974) in 1953, and they were also evident in the prodigious body of material Sioux counsel assembled for its litigation after 1957. Aboriginal entitlement was never really at issue in the Sioux Black Hills claim. What was open to question was whether the court would recognize this form of entitlement. It was never seriously addressed, however, because the United States had effectively acknowledged Sioux ownership in the 1851 and 1868 Fort Laramie treaties.

According to Professor David Wilkins (1997:226-227), the Black Hills case hinged throughout its long history on the question of the government's right of eminent domain and its authority to exercise its claimed plenary power. More specifically, it hinged on the reading of these rights as they applied to earlier Supreme Court rulings over Fifth Amendment takings of Indian lands. Several cases served as precedents in the Supreme Court decision, but the two most important ones were: *Lone Wolf v. Hitchcock* [187 U.S. 23 S. Ct.] and *Shoshone v. United States* [299 U.S. 57 S. Ct.]. In addition, the high court considered certain lower court decisions, including *Three Tribes of the Fort Berthold Tribe v. United States* [182 Ct. Cl. 543].

Ever since Supreme Court Justice John Marshall's famous 1830s rulings in *Cherokee Nation v. Georgia* and in *Worcester v. Georgia*, tribes have been viewed as "distinct, independent political communities" and as "domestic dependent nations" with certain sovereign rights in their lands. Under American law, however, the United States retains dominion over and claims title to all lands within its borders as the ultimate sovereign body (Lazarus 1991:169-170). Notwithstanding the acknowledgment of the nation's highest court that tribes have rights in their lands, especially when these are protected by treaty,[13] U.S. courts have read these rights differently and ruled inconsistently on the extent to which and the conditions under which this property can be seized by the United States through its right of eminent domain and its authority to exercise plenary power.

In the *Lone Wolf* Case, the Kiowa, Kiowa Apache, and Comanche tribes of Oklahoma brought suit against the U.S. government on the grounds that it had illegally disposed of their lands by selling them without their consent. The high court ruled that Congress had plenary power over Indian land, and that it had the power and authority to abrogate treaties and alter their provisions. It further held that the government, as the guardian of Indian affairs, maintained "paramount power" over Indian proprietary interests. In its role as trustee, the government had the right to exercise its plenary power in making "good faith" decisions on behalf of tribal interests. The court construed this power as political and not under the jurisdiction of the judicial arm of the government (Wilkins 1997:105-117; Lazarus 1991:169-170).

In the *Shoshone* Case, the Wind River Shoshone Tribe of Wyoming sued the government on the grounds that they had not received any compensation when another tribe, the Northern Arapahos, was admitted to and settled on their reservation. In this case, the Supreme Court reaffirmed congressional power over Indian property, but it also held that such power does not extend beyond its obligation to provide a fair return for its takings. The court ruled that the government had the right to seize tribal property under its power of eminent domain, but that it could not appropriate tribal lands for its own purposes or transfer them to others without giving tribes just compensation. The *Shoshone* Case was construed by the court as a Fifth Amendment taking because the tribal parties had not been offered any fair or just return (Wilkins 1997:91-104; Lazarus 1991:172-173).

Until the 1970s, decisions in the Sioux Nation case were cast, often in contradictory ways, in relation to these two precedent cases. From the very beginning, Sioux counsel believed that the proper precedent case was *Shoshone*, and that the 1877 Black Hills Agreement constituted a classic Fifth Amendment taking. The 1942 court, which presumably did not adjudicate the case, nonetheless, read the plaintiffs' claim as lacking merit because the *Shoshone* Case did not apply. Instead, they argued that in passing the 1877 Act, Congress was exercising its plenary power to make decisions on behalf of its guardians, and so *Lone Wolf* was the proper case. The 1974 court,

[13] At all levels, the courts have not always seen fit to protect Indian property rights in situations where their aboriginal title was never recognized in a treaty, agreement, or other statutory contract with the U.S. government.

by contrast, took a different position and argued that *Lone Wolf* did not apply. Instead, the precedent case was *Shoshone* (Wilkins 1997:266-227; Lazarus 1991:211, 322).

Conflicting opinions on the applicability of these two cases had dogged other tribal claims as well. So in 1974, the U.S. Court of Claims created what it identified as a "good faith" test in *Three Tribes of the Fort Berthold Tribe v. United States* to determine which of the previous precedents, *Lone Wolf* or *Shoshone*, properly applied to claims involving federal takings of tribal lands. It set forth guidelines to determine whether Congress was acting in its plenary capacity as trustee over tribal property or in a sovereign role with powers of eminent domain. It argued that Congress could not invoke both at the same time but must chose which of its "hats" it intends to wear in carrying out particular actions (Lazarus 1991:319-321). In its 1974 decision on the Sioux Black Hills claims, the Indian Claims Commission held that Congress had not functioned in its capacity as a trustee because it had not simply substituted tribal lands for money, but instead, it acted as a sovereign and seized tribal assets without making a good faith effort to fairly compensate the tribe for its taking (Ibid:321-323). On appeal, higher courts confirmed the application of the Fort Berthold guidelines in the Sioux Black Hills claim (Wilkins 1997:227; Lazarus 1991:367-369, 379-382). The Fort Berthold standard has its own problems, however, not the least of which is that a trustee/beneficiary relationship does not apply to a case unless Congress assumed such an obligation under a treaty or other statute (Wilkins 1997:227; Lazarus 1991:321-323). Congress assumed no such obligation in the 1877 statute that authorized the seizure of the Black Hills from its tribal owners.

In its final ruling on the matter in 1980, the Supreme Court in *United States v. Sioux Nation of Indians* (448 U.S. 371, 100 S. Ct:409-410, 412-413) took the position that *Lone Wolf* did not apply because the government had never attempted to give the Sioux adequate compensation for their lands. The court's majority also discredited the applicability of *Lone Wolf* on the grounds that the circumstances under which the Black Hills were seized did not lead to the conclusion that the taking was a change in its form of investment in tribal property (Ibid:413). It also struck down the government's claim that the case was political and, therefore, not subject to judicial review. The court dismissed this argument and asserted that when Congress passed the 1920 jurisdictional act allowing the Sioux to pursue their claim in court, it had sanctioned a judicial review (Ibid:414). It also held that Congress had not acted in good faith because it had not applied appropriate measures for protecting and advancing tribal interests when it appropriated the Black Hills (Ibid:415). Finally, it determined that there had been a taking under the Fifth Amendment, and that even though the government had provided the Sioux with rations, this was not a consideration but rather a form of coercion to pressure the Sioux into signing the 1876 Agreement upon which the 1877 Act of Congress was based. Therefore, the court ruled that the United States was obligated to pay the Sioux an award with interest for the illegal taking of the Black Hills (Ibid:419-424; see also Wilkins 1997:225-233; Lazarus 1991:389-401).

While the court's holding may have led to some measure of success in gaining for the Sioux a larger settlement (5% interest on the 17.5 million or 106 million) for the government's Fifth Amendment taking of the Black Hills, it did little to resolve the ambiguous nature of the relationship between tribal nations and the federal government. David Wilkins (1997:229-234) has argued that the possibility of tribes receiving full redress for illegal takings is precluded because they do not stand on equal grounds as sovereign powers before the U.S. judiciary. Their sovereignty is stripped, *ipso facto*, once they enter the legal system; here, they must assert their rights under conditions defined and restricted by the exercise of U.S. sovereignty, not on their own terms. Edward Lazarus (1991:401) also concluded that the resolution of the Supreme Court and earlier ruling bodies was flawed because it did not take into consideration tribal forms of jurisprudence and because the judges were ill-equipped to examine the history of the case in a fair

and impartial way. In his dissenting opinion, Justice Rehnquist asserted that Justice Blackmun had taken a "revisionist" position in representing the history of the case. Rehnquist's reading, however, was no less subjective and politically motivated. The "masking of justice," as Wilkins (1997) puts it, has been inevitable in U.S. Supreme Court rulings on tribal sovereignty because the U.S. Constitution is generally interpreted on grounds that are legally and politically biased in ways that favor the laws and interests of the United States over those of the tribal nations with whom it has historically litigated cases over land and religion.

C. Why the Supreme Court Decision is No Settlement At All

To the present day, the Sioux remain adamant in their refusal to accept any monetary compensation for the Black Hills. There is no end to the explanations of why the Sioux continue to refuse the settlement awarded them by the Supreme Court in 1980 for the illegal seizure of the Black Hills. Historical, economic, political, and cultural reasons have been advanced for the refusal of the Sioux to accept a monetary award, and some of these are described here, albeit in an abridged fashion.

1. Historical Perspectives

Many of the attempts to explain the Sioux's refusal to accept a monetary settlement for the Black Hills pivot in one way or another on historical events and circumstances. A subtext of Edward Lazarus (1991) treatise on the Sioux's Black Hills claim is that by prolonging the case and failing to reach a positive outcome for the Sioux prior to 1960, the U.S. government missed the propitious historical moment when a monetary settlement would have been acceptable to the Sioux for the taking of the Hills. He also blamed the ineptness of Sioux counsel, Ralph Hoyt Case, and his mishandling of the case for the failure of the tribe to reach a favorable legal resolution and settlement at an opportune historical moment. Notwithstanding internal political differences among the Sioux during the history of the case, there was a time, before 1970, when it would have been conceivable for Sioux leaders, inside and outside of tribal government, to accept a monetary settlement without political risk. After the Sioux treaty-rights movement gained momentum in the 1970s, advocating the return of the Black Hills, it was no longer politically practical or possible for Sioux leadership to even argue the merits of a monetary settlement (Lazarus 1991:349-357; New Holy 1998). By 1974, the political winds had changed direction, and the only resolution the Sioux would accept for their claim was the recovery of the Black Hills, themselves. Vine Deloria, Jr. (in Lazarus 1991:404) asserted that so many Sioux had now taken a "hard-line" view on the matter that it would be "political suicide" for any tribal leader to push for anything but a land return.

There is no question that the legal conclusion of the Sioux Black Hills claim could not have come at a more inopportune moment in history, at least from the standpoint of those who wanted the Sioux to accept a monetary settlement. A strictly historicist account, however, is not sufficient to answer the question of why this settlement was no longer acceptable to the Sioux in 1980. This question needs to be answered in other ways. On the one hand, attention must be given to the reasons why the monetary compensation was rejected. And on the other hand, the conditions under which an acceptance of the settlement was foreclosed require consideration as well. Both of these are well beyond the scope of this report, and, therefore, they can only be addressed very briefly here.

2. Economic Reasons

By the early 1980s, the power of Sioux tribal governments was considerably weakened by the treaty rights movement and the politicization of the Sioux people. None of their leaders was in a strong position to advocate on behalf of a monetary settlement, but more than that, most of them probably did not wish to be identified with a decision that directly challenged the rising tide of Sioux nationalism and its emphasis on traditionalism and sovereignty (Lazarus 1991:403-405). As Vine Deloria (in Lazarus 1991:406) argued, if the settlement money had been accepted, it would have been rapidly dissipated in communities that faced some of the highest levels of poverty in the United States. Pressures to make per capita payments and/or to support programs that attended to the tribes' ongoing needs would have siphoned off the funds. The compensation would have quickly evaporated, leaving only ephemeral effects. It could not have contributed to any lasting solution to the Sioux's vast economic needs. In the end it was not worth it for the Sioux or their leaders, to sacrifice their continuing sense of entitlement to the Black Hills in exchange for a fleeting sum of money. As Sioux leaders had recognized a century earlier, the Hills held a lasting and irreplaceable storehouse of resources that could provision their people for "seven generations" to come. Even though much of the Hills' resource value had already been extracted since 1874, contemporary Sioux still saw them as capable of providing some measure of economic independence as evidenced in the plans they put forth in their 1985 land recovery bills (see below).

3. Cultural Rationale

Many Sioux believe that the Black Hills are beyond any price because they are sacred, standing at the very heart of their culture and traditions. They proclaim that the Black Hills can never be sold, and that the only acceptable settlement for their theft by the United States is the return of the land (U.S. Senate 1985; Black Elk, C. in Doll and Deloria 1994:29; Clifford in Doll 1994:60; Gonzalez in Doll and Deloria 1994:92; Gonzalez 1996; Lazarus 1991:351-353). In the face of such beliefs, the elected leaders of the various Sioux tribes who were parties to the Black Hills litigation and potential beneficiaries of the settlement were placed in a quandary, which Edward Lazarus (1991:405) describes as follows:

> Sioux leaders faced a choice that was really no choice at all. On the one hand, if they voted to use the Black Hills money, they faced certain accusation of having repudiated their heritage and having accepted as justly resolved the tribe's grievances against the United States that for a century had served to explain and excuse four generations of shattered lives. On the other hand, if they voted to reject the Black Hills money, they could don the mantle of traditionalism while in fact sacrificing nothing.

Befuddled by why, after all these years, the Sioux were apparently no longer willing to accept a cash payment for the Hills, some writers began to explore the origins of the cultural rationale behind the change. Richmond Clow (1983) offered one of the first attempts to account for the cultural grounds on which the settlement was being rejected. He argued that the Black Hills claim had become a "tribal symbol," which united the Sioux people and provided them a common purpose after they were dispossessed of their lands and moved onto reservations. He maintained that the Sioux rejected the monetary compensation for the Black Hills because to admit that their struggle over the Hills had ended would have been to lose the "symbol" that unified them and given them a cultural identity as Sioux people (Clow 1983:315-316). As discussed in more detail in Chapter Thirteen, Clow, among other writers (Parker, W. 1985; Feraca 1990; Chirinos 1991; Worster 1992; Bordewich 1996), also took the position that the symbolic and sacred significance of the Black Hills had been invented by modern Sioux to maintain their sense of identity and to

justify their present political aspirations, which included, most predominately, the recovery of the Hills themselves.

Alexandra New Holy (1997, 1998) offers a more complex and compelling interpretation of the connection of the Black Hills to a modern Sioux identity and culture. In contrast to many other non-Indian writers, New Holy asserts that the Sioux have long held the Black Hills as sacred. She argues that for the Sioux the Black Hills, as Nicholas Black Elk once put it, are the 'heart of everything that is.' They have remained one of the most significant and concrete manifestations of Sioux (more specifically, Lakota) culture and identity from pre-reservation times to the present (New Holy 1998:317-321). Before 1877, New Holy (1998:322-323) argues the Black Hills were a place of shelter, a source of sustenance, a site of trade and political negotiation, and, above all, a religious sanctuary. They were a place, as she puts it, to which the Sioux maintained "a lived relationship" (Ibid:322). This was an area they entered freely for their own material, social, and spiritual purposes. The importance of this relationship, she contends, was well recognized by Sioux leaders in speeches they gave during the 1875 and 1876 deliberations over the sale of the Hills (New Holy 1998:325-330). After their seizure by the U.S. government in 1877 and until 1970, the Sioux reasserted their claim to the Hills through the only remedy they saw available to them, the federal court system. They pinned their hopes on a lucrative cash settlement that would end their poverty and promise them a better life (Ibid:331-334). New Holy (Ibid:334-335) points out that as early as 1964, some of the Sioux, who had moved to the cities of California, began to study the 1868 Fort Laramie Treaty and used the terms of Article 6 as grounds for the occupation of Alcatraz. A decade later, other Sioux activists would rely on this treaty to mobilize their movements including the protest at Mount Rushmore in 1970, the occupation of Wounded Knee in 1973, and the takeover of lands in the Black Hills in 1981 (see also, Chapter Six). In alliance with traditional elders from the Pine Ridge Reservation, including Frank Fools Crow and Pete Catches, the activists rekindled their commitment to Lakota culture, language, and traditions. They began to learn about and participate in the Lakotas' long-standing spiritual relationship to the Hills and to use this connection to shift the grounds on which they were staking their claims to the Hills (Ibid:336-339). By the time of the Supreme Court ruling in 1980, the old grounds were no longer a culturally viable place to stand in relationship to the Hills, and the only acceptable course was to reclaim ownership of the area, or at the very least, unfettered access to the places of sacred importance (Ibid:339-352).

Elsewhere, New Holy (1997) offers an in-depth analysis of how the spirituality and politics surrounding the Black Hills evolved over time into a much more encompassing and holistic sense of Lakota identity, nationhood, and cosmology (see Chapter Thirteen for further details). At the crux of New Holy's interpretation is the position that the Lakota's relationship to the Hills is multistranded, woven from many complex and intersecting threads. In their attachment to the Black Hills, religious ties cannot be separated from social, political, and economic ones because they are all joined together as one. The Black Hills, as the quintessential center of all that is, represents the Lakotas' idea of cosmic singularity, which stands at the foundation of their traditional religious precepts. The Hills are the people, the land, the resources, and the sacred universe wrapped into a single space. Because so much is embedded in their presence, the Sioux's claim to them cannot be settled in any singular or unilateral way. While a monetary settlement might address at least one of the threads that tie the Sioux to the Black Hills, it will never be sufficient to compensate for all the threads that make up the complex cultural tapestry that is the Black Hills.

4. Political Terms

The Sioux's religious connection to the Hills cannot be dismissed, reduced, or explained away simply by politics, as some non-Indian writers have tried to do (Clow 1983; Parker, W. 1985; Feraca 1990; Chirinos 1991; Worster 1992; Bordewich 1996). Whatever concurrent religious motivations lie behind the Sioux's modern quest to reclaim the Black Hills, they are closely linked to their understanding of "sovereignty." As defined in its broadest sense, sovereignty represents a nation's right to control and determine the destiny of its people on political, economic, social, cultural, and religious grounds. Since the 1850s, the struggle between the United States and the Sioux has boiled down, in one-way or another, to questions of sovereignty. The Black Hills has stood at the center of this struggle because they have been a supreme symbol of Sioux sovereignty in its broadest sense. The Sioux never relinquished the Black Hills by their own volition; these lands were appropriated from them through congressional action. The Sioux knew the 1877 Act was illegal from the beginning, and they started organizing in the 1880s to challenge its terms. With the hope that the U.S. court system would give them some measure of justice, they became increasingly embittered when ruling after ruling did not end in their favor. Over time, many were beginning to believe that legal avenues were futile because they were forced to play by rules to which they had never been a party and to which they never consented. Although their first attorney Ralph Case may have bungled their claim on legal grounds, he at least had the moral side of their story correct. Even though the Sioux lost their legal battles under his counsel, they continued to support him not because they were naive, as Edward Lazarus (1991:180-181, 187, 206) implies, but precisely because he understood the grounds on which their case rested. That these grounds had little standing in U.S. courts only confirmed Sioux suspicions that the American justice system would never give them a fair hearing on their case. Their growing lack of faith in the American legal system helped to nurture the growth of a movement that would ultimately refuse settlement on any terms that did not include land recovery.

Today, there is a fundamental difference between how the federal government interprets its sovereign relationship to the tribal nations of this country, and the way these nations understand their sovereignty *vis å vis* the United States. The Sioux see themselves as members of a sovereign nation, possessed with its own plenary powers and rights of eminent domain. When they negotiated treaties with the federal government, they were doing so, not as the subjects or "wards" of the United States, but as one sovereign to another. Some might argue that when the Sioux signed the 1825 peace treaty with Atkinson and O'Fallon, they effectively surrendered their sovereignty to the United States. By the terms of this treaty, however, they merely pledged their loyalty to the United States and its trade interests, something they normally did with one another without acceding any sovereignty. What the Sioux continue to assert is that they were recognized by the United States as a sovereign nation under the terms of the 1868 Treaty of Fort Laramie. From their viewpoint, this is the only legally binding treaty they entered into with the government, and as a result, they have never deferred their sovereignty to the United States. To reject the Supreme Court settlement of 1980 is more than a matter of money, it is a question of sovereignty. By accepting the terms on which the court ruled in their case, the Sioux would be granting the United States the right to exercise its plenary power and eminent domain over them. In effect, what many Sioux are saying is that they are not willing to relinquish their *de jura* sovereign powers to the United States, even though these have been severely compromised since 1877 on *de facto* grounds. The Black Hills are not for sale because the Sioux as a sovereign people have never given the government their consent to purchase them. In the end, there remains the understandable fear that in "selling out" the Black Hills, the Sioux would not only be sacrificing the very soul of their nation but also its promise of sovereignty.

It can be easily argued that such claims are idealistic and lack any grounding in political or legal reality, but however they are perceived, the fact of the matter is that the status of the Black Hills will stay in political limbo for some time to come. It will remain the grounds on which the Sioux continue to stage their sovereign struggles, and it will remain a flash point for contestation and confrontation between the Sioux peoples and the federal government.

III. CONGRESSIONAL LAND RECOVERY ACTS

Although the Supreme Court's 1980 decision vindicated the Sioux position that the taking of the Hills constituted an illegal Fifth Amendment taking, the political ground on which the Sioux staked their struggle over the Black Hills had shifted. By the time of the settlement, many Sioux began to recognize that their attempts to acquire compensation for the Black Hills stood in conflict with a "strict adherence to the terms of the 1868 treaty*"* and their ideas about sovereignty (Lazarus 1991:325). On the 18th of March in 1974, the Black Hills Sioux Nation Council (hereafter referred to as the BHSNC)[14] rejected any sort of monetary settlement and proclaimed that the Black Hills were not for sale (Lazarus 1991:326-327). By the time the Supreme Court reached its decision, many Sioux held the position that taking settlement money was, as Lazarus (1991:325) put it, "not only logically absurd, it represented a capitulation to U.S. treaty breaking, a sellout to white and capitalist notions that land and money were interchangeable or more crassly, that Sioux lands could be bought".

Two years after the Supreme Court ruled on the Sioux claims, and one year after the failed occupation at Wind Cave National Park, some Sioux started to mobilize support for the passage of a land recovery bill in Congress. Pursuant to this effort, Sioux leaders agreed to establish a committee to draft legislation for the recovery of lands in the Black Hills and to organize a campaign to lobby on its behalf (Lazarus 1991:414). A year later in January of 1983, the Black Hills Steering Committee chose Gerald Clifford to head this legislative effort, and they voted unanimously to secure the return of all their Black Hills land (Ibid:415). Working with Mario Gonzalez, counsel for the Oglala Sioux Tribe, Charlotte Black Elk, an educator; and other tribal members, Clifford began the daunting task of drafting legislation that would simultaneously achieve widespread approval from the various and often divided constituencies within the Sioux Nation, and at the same time, gain support from politicians in Washington, D.C. (New Holy 1998:342-343).

From the beginning, the land recovery efforts were disrupted by personal and political conflicts within the Sioux's own ranks, most notably the split between Gerald Clifford and Oliver Red Cloud of the BHSNC (Lazarus 1991:415). As Alexandra New Holy (1998:343) observed, the conflict between these two men had roots in a long-standing division within the Oglala tribe that reached back to the generation of Oliver Red Cloud's famous great-grandfather and the non-treaty leaders, Little Big Man and Crazy Horse, who were the direct ancestors of Gerald Clifford and Charlotte Black Elk. In the midst of this internal conflict, several years passed before a compromise was reached among contending Sioux political groups and before eight tribal governments passed resolutions in support of a land recovery bill. In the meantime, efforts were taken to secure congressional sponsorship for the bill. Bill Bradley, a Senator from New Jersey,

[14] Black Hills Sioux National Council (BHSNC) was organized in the 1920s to pursue the Sioux's Black Hills claim in court. Throughout its long history, there has always been a measure of tension between its interests and those of the IRA (Indian Reorganization Act) tribal governments. In the 1970s, the BHSNC was one of the first Sioux political bodies to oppose a legal remedy for the taking of the Black Hills and to consider new strategies for seeking redress.

agreed to bring the bill before Congress, and on July 17, 1985, he introduced the Sioux Nation Black Hills Act in the Senate. Lacking support of the South Dakota delegation, the bill died quickly without even a subcommittee vote (Lazarus 1991:418-419).

The Sioux Nation Black Hills Act (U.S. Senate S. 1453, 1986:2-28) proposed the creation of a new Sioux reservation, in which the Sioux would gain title to all federal lands in the Black Hills, except for Mount Rushmore (U.S. Senate S. 1453, 1986:11). Wind Cave National Park, for example, would have become part of a newly formed Sioux Park, which would be open to everyone, Indians and non-Indians. Certain sacred locations in the newly created park would have been kept off limits to outsiders, however (U. S. Senate S. 1453, 1986:16-19). The bill allowed private citizens and the state of South Dakota to keep their properties with the proviso that the Sioux tribe would retain a "first right of refusal" to purchase these lands (U. S. Senate S. 1453 1986:13). It also included monetary compensation for "lost use of the land rather than just compensation for expropriation," and it proposed measures for the tribe to receive revenue from the administration of grazing and timber leases, but it prohibited all forms of commercial mineral extraction (U. S. Senate S. 1453 1986:19-22). It also included provisions for the management of the area through the Black Hills Sioux National Council (U. S. Senate S. 1453, 22-28; Lazarus 1991:418; New Holy 1998:342).

While the Sioux Nation Black Hills Act may have been the most politically realistic compromise in the face of tribal politics, it had little chance of success on practical grounds (Lazarus 1991:420). Years earlier, Richard West, now director of the Museum of the American Indian and formerly a partner in the law firm that represented the Sioux in their Black Hills claim, met with Robert Fast Horse, one of the leaders of the occupation at Wind Cave National Park, and suggested, according to Lazarus (1991:414), that the Sioux "would have to identify provable sites of religious significance, mount a national and international public relations campaign, and secure the support of the South Dakota congressional delegation." He also went on to write: "West believed that with good strategy and a little luck, the Sioux might be able to recover all federal lands except for those existing inside national parks" (Lazarus 1991:414). While the Black Hills Steering Committee compiled and presented an impressive, although controversial, body of evidence to Congress on the sacred significance of the Hills and its various sites, and while they were able to generate some degree of support in the national media, they had little success in securing any support from South Dakota's congressional delegation.

After hearings before the Senate Select Committee on Indian Affairs in 1986 (U.S. Senate:29-86), where the Sioux presented their religious case on the sacred significance of the Black Hills, Senator Bill Bradley reintroduced his bill, the Sioux Nation Black Hills Act [S. 1453], in the Senate on March 10, 1987 with the support of Daniel Inouye of Hawaii and Stewart Udall of Arizona (Lazarus 1991:422-423). Whatever progress the Black Hills Steering Committee had made in getting their bill before Congress, however, was soon undermined by the Sioux's own internal politics. With the support of an association of the elderly, known as the Grey Eagle Society, the BHSNC headed by Oliver Red Cloud opposed the Bradley Bill and publicly voiced its opposition within a week of the bill's reintroduction in Congress (Lazarus 1991:423).

Oliver Red Cloud and his supporters stood behind a successful Sioux businessman from California, Phil Stevens, who argued that the Bradley bill offered insufficient compensation to the Sioux (Lazarus 1991:423). After convincing many Sioux that they could realistically gain a 3.1 billion compensation package over the 106 million provided in the Bradley Bill, Stevens shifted the tone of Sioux land recovery efforts from their religious foundation to more pecuniary grounds (Lazarus 1991:424; New Holy 1998:343-345). In the face of strong political disagreements

among the Sioux, Clifford reluctantly asked Bradley to hold his bill until the Sioux ironed out their differences (Lazarus 1991:424).

Meanwhile, stringent opposition to the Bradley Bill from the South Dakota Congressional Delegation was mounting. The lead Senator from South Dakota, Tom Daschle, extracted a promise from Daniel Inouye that no further hearings or other actions would take place on the bill unless Daschle supported them. The other senator from South Dakota, Larry Pressler, successfully lobbied to block any land return bill. Daschle also supported the formation of a citizens committee in South Dakota under the leadership of David Miller, a historian from Black Hills State College, called the "Open Hills Committee," which rapidly gained the support of the most conservative South Dakotans (Lazarus 1991:425).

After wrecking any chance the Sioux might have had in getting the Bradley Bill on the floor of the Senate, Stevens funded the drafting of another bill with the assistance of Mario Gonzalez and used his influence with Matthew Martinez, a Representative from California, to introduce it in the House of Representatives on September 19, 1990 (Lazarus 1991:427). It failed to achieve any action in Congress, and Martinez refused to reintroduce it because of strong opposition within Sioux ranks (New Holy 1998:345). In 1992, several Sioux tribes rescinded their endorsement of Phil Stevens (Lazarus 1991:426; New Holy 1998:346-347). A year later, another effort was made to get support for a third bill, the *Sioux Nation Black Hills Restoration Act of 1993*, but it never received formal approval from any of the Sioux tribes. In the face of the continuing and bitter polarizations between the Clifford-Bradley and the Stevens-Martinez camps, any further action to get congressional support for the return of the Black Hills became futile (New Holy 1998:347; Hill 2000). No further attempts have been made to approach Congress for the return of Black Hills lands to tribal ownership, although some Lakotas were still working on these efforts through 1995 (Melmer 1995).

Over the past century and a half, the political, economic, and cultural tides have waxed and waned on both the Sioux side of the ledger and on the side that represents the interests and sentiments of the U.S. government and the American public at large. Only rarely has the pendulum of history swung in tandem with the interests of both parties. The 1980s was a period when the two sides might have been able to reach a just and fair solution to the impasse over the Black Hills through some form of congressional legislation, but this did not happen. Presently, we are at a juncture in time when the two sides are standing farther apart than they did even a decade ago. This is not the moment for the Sioux to push a bill in Congress for some form of land reclamation. Nor is it a propitious time for them to consider how they might accept a monetary settlement to achieve the return of some of their Black Hills lands, as judged by the anger generated when the Santee Sioux tribe considered seeking their portion of the award money from the 74A claims docket, which included lands the Sioux lost in 1877 but outside the Black Hills (Little Eagle 1996: A1, A2; Melmer 1996c: A1, A6). Even if the Sioux decided to use their settlement monies to purchase land inside the Hills, they would only be able to procure private holdings, not some of the public lands that are the most important to them. Only through congressional action would they be able to secure title to and sovereignty over lands of sacred and cultural significance, including Bear Butte Lodge, Craven Canyon, Bear Butte, Reynolds, Slate and Gilette prairies, Harney Peak, Wind Cave, and the Race Track, and such action is not likely in the near or foreseeable future. Meanwhile, the Sioux and other tribes are pursuing other avenues to gain access to and protection for sites on public lands that are culturally and spiritually significant to them.

IV. LEGAL STATUS OF TRIBAL ACCESS TO FEDERAL LANDS

While the Sioux were not successful in having their specific interests in the Black Hills addressed by Congress, tribal concerns of nationwide importance were receiving widespread congressional support. In the 1970s and 1980s, important pieces of legislation were passed that acknowledged tribal sovereignty in diverse areas from taxation and economic development to child welfare and health-care delivery. In addition, Congress passed laws that recognized tribal religious freedoms, their interests in certain forms of cultural properties, their rights to access public lands for traditional cultural purposes, and their concerns over the handling of funerary remains.

A. Congressional Statues and Executive Orders

Four congressional statues and two executive orders have specific relevance to national park lands, and these need to be briefly described here. The first four became law through congressional action, while the last two were enacted in the Office of the President as Executive Orders.

1. National Historic Preservation Act

In 1966, Congress passed legislation known as the National Historic Preservation Act (hereafter, NHPA) that protects sites of historic interest. Subsequently and through 2000, this act has been amended on numerous occasions. Today, NHPA protects any of a variety of historic and prehistoric sites of local, regional, and national importance. The cultural properties of American Indians come under the provisions of this law in several ways. The law provides protection for places associated with important individuals, natural landforms with religious significance, and locations associated with traditional cultural practices. It requires federal agencies to inventory and evaluate cultural properties on the lands they administer. Under Section 106 of the Act, the agencies must notify the Advisory Council on Historic Preservation of any actions that might impact eligible properties, and they must carefully evaluate the consequences of issuing licenses to users that may affect properties already listed on the National Register (Parker and King 1990).

2. The American Indian Religious Freedom Act

This act, Public Law 95-341 [92 Stat. 469] (hereafter, AIRFA) of 1978 establishes the rights of American Indian people to access public sites for the practice of their religious observances, to use and possess sacred objects necessary to the conduct of their religion, and to freely worship according to the dictates of their religious beliefs. Under the provisions of this legislation, federal agencies are required to consult with tribes whenever their management practices might endanger sacred sites, burials, and other ethnographic resources or restrict access to such sites.

3. Archaeological Resources Protection Act

A year later, Congress enacted another piece of legislation Public Law 96-95 [16 Stat. 470] (hereafter, ARPA), which governs all cultural and spiritual sites over fifty years of age. It restricts the issuance of permits by federal agencies that might endanger a site, and it requires consultation with tribes who consider it significant on religious or cultural grounds. Additional amendments to this statue were enacted in 2000 to strengthen its enforcement.

4. Native American Graves and Repatriation Act

This statute [Public Law 101-601] (hereafter, NAGPRA) which was passed by Congress in 1990, governs the proper protocol for handling skeletal and funerary remains from unmarked graves, and it covers the return of objects of cultural patrimony, sacred or otherwise. It also requires consultation with tribes with whom a cultural affiliation can be established for funerary remains.

5. Indian Sacred Sites Executive Order 13007

This directive passed on May 24, 1996 directs all agencies responsible for federal lands to provide accommodations to protect sites of sacred significance to American Indians and to permit access to and use of these sites by the religious practitioners of federally recognized tribes.

6. Consultation with Tribal Governments Executive Order 13084

Passed in May of 1998, this is the most recent of a string of executive orders that affirms the special sovereign status of federally recognized tribes. It directs all federal agencies to work with tribes on a government-to-government basis and to institute measures whereby tribes may collaborate in consultation processes surrounding the formulation of regulatory policies and practices affecting the interests of their communities.

B. The Court Litigation

Since the creation of these statues and directives, federal agencies and local administrators of public lands and properties have taken very different steps in implementing them in relation to their own management policies. They have also responded in very different ways to the attempts of tribal peoples to assert their various rights under these laws, and in some cases, their management policies have collided with tribal interests, leading to litigation in the courts. In the case of the Black Hills, several cases have gone to court that revolve around the rights of tribal people to access and use public lands for religious purposes.

Most of these cases have been tried under the provisions of AIRFA, which in Section 2 of the statute, directs federal agencies "to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices." In recent years, a number of scholars have written about the impact this law has had on the use of public lands for the practice of tribal religious observances, and they have analyzed various cases where the courts have not ruled in favor of tribal interests. The rulings indicate a number of things, and paramount among these is a basic conflict between congressional intent and the legal interpretation of the meaning of a statute. While Congress desired protection for Indian religious beliefs and practices, and even required federal agencies to make accommodations for them, the courts have trampled on the spirit of the law by empowering federal agencies with the authority to determine how much freedom, in fact, can be exercised (Ensworth 1983:172-175; Pemberton 1985:328; Wilkins 1997:274). In this regard, it is worth quoting Richard Pemberton (1985:322-323) at some length:

> The court has said agencies may not deprive persons of constitutional protected rights or liberties without giving them a substantive evidentiary hearing. Assuming federal agencies have the authority to decide whether Indians' first amendment rights are violated, courts must subject

> agency legal conclusion to the appropriate standard of review. Under that standard, the reviewing court must independently determine whether the agency's proposed action conflicts with Indian people constitutionally protected religious freedom. By empowering executive agencies to decide with finality the legitimacy of a tribe's religious claims to public land, our courts offend the constitutional rights of tribal members. As presently interpreted, the Act restricts the court's inquiry into first amendment issues once an executive agency has ruled that its decision conforms to the Act. The agency is, of course, inclined to so rule since it has itself initiated the action of which the Indians complain. Thus though Indian litigants may still bring actions under the free exercise clause against executive agencies and private developers in federal court, the agency's self-determined compliance with the AIRFA will serve as prima facie evidence that it has not violated the Indians constitutional rights. This interpretation of AIRFA restricts rather than enhances the religious freedom of American Indians. Though the courts insist that the Act has no teeth, they interpret it in such a way that it gnaws at the liberty of those whom it is designed to protect.

One of the earliest and most famous cases testing the strength of AIRFA (Pemberton 1985:329-330) is United States Marshals Service v. Means, 724F.2d 642 [11th Cir. 1983], in which the U.S. Forest Service denied a group of Lakotas an extended permit for the establishment of the Yellow Thunder Camp at Victoria Creek in the Black Hills, ordering them to vacate the site they occupied on September 8, 1981. Camp members filed an administrative appeal to the forest service's eviction notice, but on September 9, 1981, the United States filed a suit against the principals of the camp on the grounds that they were occupying the land illegally. Six days later, the camp principals filed a countersuit, in which they alleged that the Forest Service's decision to deny them a special use permit was arbitrary, racially motivated, and violated their rights under AIRFA and the Constitution. The actions were consolidated into a single case, which ended up in the 11th Circuit Court, where the presiding District Judge, Donald O'Brien, ruled in favor of the Lakotas, ordering the forest service to grant the campers a permit on the grounds that its decision was indeed arbitrary and that it violated that the campers' rights under the First Amendment of the U.S. Constitution. O'Brien also held that access to the Black Hills was fundamental to the practice of the Lakota religion. In 1988, the Eighth Circuit Court, in *The United States vs. Means*, 858 F.2d 404, overturned the ruling of the district judge in Sioux City, reasserting the right of the Forest Service to evict the campers and upholding what had become a long line of precedent cases privileging the policies of public agencies and even private developers over tribal religious interests (Pemberton 1985:329-330; New Holy 1998:339-342).

Another famous case testing the strength of AIRFA is *Crow v. Gullet*, 541 F. Supp. 785, in which Frank Fools Crow, Pete Catches, and other spiritual leaders from the Lakota, Cheyenne, and Arapaho tribes sued the state of South Dakota on the grounds that the state's actions had desecrated Bear Butte, a site vital to tribal religious observances, by allowing tourists to defile the site and disrupt ceremonies conducted there (Pemberton 1985:325-326). The court ruled that because the Lakota, Cheyenne, and other tribal religionists have no "property interest" in a state park, as sanctioned in federal or state law, they have no grounds on which to restrict how it is managed by the state. The court further held that the actions of the state did not infringe on their beliefs and practices, and that the state was not required to accommodate its management policies to tribal religious interests. It also held that the integrity of the butte and its landscape had no relation to tribal religious practice. Indeed, the court concluded that the state held the right to restrict tribal religious practice in the interest of keeping the park open to tourists (Pemberton 1985:325-327).

In the same year, the state of South Dakota sued a Lakota religionist, Dewey Brave Heart, in *South Dakota v. Brave Heart* 326 N.W. 2D 220, for burning a ceremonial fire in the Black Hills without a permit. Although Brave Heart and other plaintiffs had applied for a permit to build a

ceremonial fire for their Sun Dance, their application was denied by the forest service (Pemberton 1985:328). A South Dakota law enforcement officer arrested Brave Heart and the other worshippers, who were subsequently convicted. On appeal, South Dakota's Supreme Court ruled that the Forest Service was justified in denying a permit to the Lakotas given the dry weather conditions in the area (Pemberton 1985:329). The court denied the Lakota's First Amendment right to practice their religion on the grounds that they had failed to prove that an open fire, rather than a stove or other fire-making enclosure, was necessary and central to the practice of their religious observances (Pemberton 1985:330).

The most recent case addressing AIRFA issues in the Black Hills is *Bear Lodge Multiple Use Association v. Babbitt*, 2 F. Supp. 2d 1448, where the 10th District Court ruled in 1998 against a mandatory ban on commercial climbing at Devil's Tower National Monument during the month of June in order to permit tribal religionists to practice their ceremonial observances. It allowed, however, a voluntary ban on the climbing. Although National Park Service staff, climbing organizations, environmental groups, and tribal representatives had worked together to achieve some compromise in formulating a workable management plan, which was finalized in 1995, the proposed restrictions on climbing brought the plan to court (Melmer 1996: A1, A3; 1996b: A1, A2). The 10th District Court's ruling only confirmed other court decisions that have denied tribes any kind of exclusive protections and rights of access to their sacred sites. Indeed, most of the final court decisions on AIFRA, including those that have reached the Supreme Court, have not ruled favorably on behalf of tribal interests. Many have argued that these rulings have denied tribes the free exercise of their religious rights because AIFRA fails to detail the conditions under which tribal religious sites require access and protection. One of the frequent criticisms of current judicial rulings on AIFRA cases is that they apply Judeo-Christian standards of religious observance to tribal beliefs and practices. But even if the law had greater specificity, it still would not address the issue of who determines compliance to the law and on what grounds the compliance rests. As David Wilkins (1997:255-261) argues in his analysis of a Northern California case, the Supreme Court's ruling privileges federal administrators in making decisions about public land use and the rights of tribes to access them for religious purposes. What this ruling and others clearly imply is that, while tribes have a legitimate interest in protecting religious sites and have a right to access these places, they can only do so as long as their concerns and practices do not infringe on other user groups and/or federal management policies. Even in the face of the First Amendment and AIRFA, a tribe's religious sovereignty is ultimately constrained by the people who hold title to the land whether they are private developers or federal agencies. So far, court rulings, including those of the highest judicial body in the land, have favored the protection of property over religious freedom. In response to a spate of unfavorable rulings, tribes are now actively lobbying Congress to amend AIRFA or pass new bills that will afford their religious sites and practices greater protection under the law.

V. THE STATUS OF WIND CAVE NATIONAL PARK LANDS

Although many different tribal nations historically occupied lands in the southeastern Black Hills, including the lands that make up Wind Cave National Park, only three tribes, the Sioux, Arapahos, and Cheyennes, ever entered into treaties with the United States government that covered these lands. All of the treaties concerning the Black Hills were concluded at Fort Laramie in Wyoming Territory; one was negotiated in 1851 but never ratified by Congress, and the other two [15 Stat., 635 and 15 Stat., 655] were enacted in 1868. One of the 1868 Fort Laramie Treaties [15 Stat., 635] included the Black Hills in a reservation for the undisturbed use of the Sioux, but it contained language that permitted some of the Arapahos and Cheyennes to occupy the area as well. This arrangement was confirmed in another 1868 treaty [15 Stat., 655]

with the northern divisions of the Arapaho and Cheyenne nations. The reservation established by the 1868 Fort Laramie Treaty [15 Stat., 635] includes lands that now make up Wind Cave National Park.

Northern Cheyennes and Northern Arapahos were also present at the deliberations in 1875 and 1876 that led to the 1877 Agreement and the relinquishment of tribal title to the Black Hills and the lands of Wind Cave National Park. The Arapahos were specifically named in this agreement, but the Cheyennes were not. Parties from both tribes, however, were signatories to

TABLE 1. FEDERAL TREATIES AND ACTIONS WITH TRIBAL NATIONS THAT COVER THE BLACK HILLS AND WIND CAVE NATIONAL PARK

Year	Legal Document	Action
1825	Atkinson and O'Fallon Treaty	Trade, peace, and friendship with United States and its traders.
1851	Fort Laramie Treaty	Peace and friendship with United States and its citizens. Tribal boundaries demarcated. Black Hills placed within the borders of the Sioux Nation.
1868	Fort Laramie Treaty [15 Stat. 635]	The creation of the Great Sioux Reservation for the use and occupancy of the Sioux Nation. Black Hills situated inside this reservation.
1868	1868 Fort Laramie Treaty [15 Stat. 655]	Northern Arapaho and Northern Cheyenne accorded the right to settle on Great Sioux Reservation, which includes lands in the Black Hills.
1877	Black Hills Agreement	Congress authorizes seizure of the Black Hills and other Sioux lands. The land area of the Great Sioux Reservation reduced accordingly.
1980	Sioux Black Hills Claim	Supreme Court rules that the 1877 federal seizure of the Black Hills was illegal. The Sioux Nation awarded a monetary settlement, still unclaimed, for the taking.
1985	Sioux Land Recovery Act (Bradley Bill)	Testimony heard before the Senate Select Committee on Indian Affairs regarding a proposed bill to return Wind Cave National Park and other federal lands in Black Hills to the Sioux. No further action taken on this bill.

the negotiations in 1876. This agreement, however, did not secure signatures from three-quarters of the Sioux's adult male population as stipulated in the provisions under Article 12 of the 1868 treaty with the Sioux [15 Stat., 635]. Nonetheless, Congress passed the statute in which the Black Hills and adjoining lands were taken from the Sioux without their full consent. Less than a decade after its enactment, all three tribes believed they had been robbed of their lands in the Black Hills and challenged the legality of the agreement and the deceptive and confusing manner in which it was presented. In the early decades of the twentieth century, all three tribes attempted to get Congress to pass jurisdictional acts on their behalf so they could take their cases to the U.S. Court of Claims. Only the Sioux, however, succeeded in this effort.

From 1920 to 1980, the Sioux's Black Hills case was heard several times before the U.S. Court of Claims and the Indian Claims Commission. Finally, it went before the U.S. Supreme

Court, which ruled in favor of the Sioux's claim that the Black Hills had been seized from them as a Fifth Amendment taking and awarded them $17.5 million as settlement for the value of the Hills and its gold at the time of the taking plus interest for a total of 106 million dollars. The Sioux have never accepted the settlement, and it remains in the U.S. Treasury accruing interest.

From the perspective of the United States legal system and many of its citizens, the highest court in the land, the Supreme Court, has settled the Sioux's Black Hills claim. However immoral or unfair the government's taking of the Black Hills may have been from a Sioux (and their Arapaho and Cheyenne allies') standpoint, the U.S. Constitution grants the nation the right of eminent domain over the lands within its territorial boundaries. Federal courts have also determined that Congress has plenary power to execute land-takings but only if their owners are given fair and just consideration for the taking. The Supreme Court's decision acknowledged this and ruled that Sioux lands had been taken without adequate consideration. It offered its only available remedy for the federal government's illegal seizure, a cash settlement for the value of the lands plus interest from the date of their taking.

The lands of Wind Cave National Park, although certainly not acquired fairly from the Sioux, have been given consideration in terms of U.S. law through the settlement awarded by the U.S. Court of Claims and affirmed through a *writ* of *certiorari* by the Supreme Court. Whether or not one believes that this settlement ultimately represents a morally sound and fair solution, it is the only one available under U.S. law. No final legal determination or settlement, however, has ever been made on behalf of Northern Cheyenne and Northern Arapaho treaty interests in the Black Hills. Both tribes also have historic treaty rights and claims to park properties, but neither tribe was ever able to get their Black Hills claims heard before the U.S. Court of Claims or the Indian Claims Commission.

Although the Sioux ultimately received a favorable ruling and settlement on their behalf, they have refused any compensation for the Black Hills on a number of different grounds. The most significant of these revolves around their sense of sovereignty as a nation. This sovereignty finds expression not only in politics but also in religion, and even more specifically, it is enacted and symbolized in their struggles over the Black Hills. Sacred areas in the Black Hills, including Wind Cave National Park, became a site of this struggle in the 1980s. The Sioux pushed to reclaim park lands and other federal properties in the Black Hills, and to this end, they tried to get land recovery legislation passed in Congress from 1985 to 1993. Their efforts did not succeed.

The conflict over the Black Hills is more than just a fight over real estate. It is a struggle over who ultimately defines a human relationship to the land. In the absence of title to the Black Hills, the Sioux, Cheyennes, and Arapahos have fought to gain protection for and access to areas they hold sacred. Some of their efforts have been accommodated, at least in part, on lands under the jurisdiction of the U.S. Department of Interior and the National Park Service at Devil's Tower National Monument and at Wind Cave National Park. Tribes have been less successful, however, in securing protections and accommodations necessary to the practice of their religion on state lands in South Dakota, notably at Bear Butte, and on federal lands in the Black Hills supervised by the U.S. Department of Agriculture and the U.S. Forest Service. In both instances, litigation took place that favored state and federal managerial policy over tribal religious interests.

So far, Wind Cave National Park has escaped litigious encounters over federal laws that now give tribes certain protections for their sacred sites and rights to access them in ways consistent with traditional religious practice. Whether due to flexible policy or thoughtful administration, the U.S. Park Service appears to have had a more open-minded attitude towards accommodating tribal religious interests on the lands they manage in the Black Hills than the U.S. Forest Service.

Few of the traditional access issues that the Park Service has faced over the past twenty years have required court intervention. In the one that did at Devil's Tower National Monument, National Park Service management took a position that was respectful of tribal religious concerns. Park managers, however, still face the prospect of having to develop policies and make managerial decisions that are responsive to the congressional intent of new federal laws, and doing so in ways that accommodate tribal interests, minimize potential conflicts with other user groups, and avoid legal adjudication. Since the passage of the American Indian Religious Freedom Act, court rulings have not been very helpful in this regard. Indeed, as Richard Pemberton (1985:322-323) has rightly argued, the courts have put public administrators in difficult and often untenable positions, which require them to make final determinations on religious matters they are ill-equipped or ill-prepared to take on. On the one hand, the courts have given public administrators the right to make decisions on religious matters pursuant to their land management policies, but on the other hand, they have denied them the jurisdictional authority to decide issues of constitutional rights under the free exercise clause of the First Amendment. As Pemberton (1983: 321) aptly puts it, the courts "place bureaucrats in the classic position of standing between a rock and a hard place".

Once again, sacred land issues have come to the forefront in tribal politics. These are now a primary topic of concern before the National Congress of American Indians, and it is the focus of a major lobbying effort to get Congress to enact stiffer laws to protect sacred sites and accommodate tribal religious practices. Mount Graham in Arizona has drawn considerable media attention over the past year in relation to tribal efforts to stop the building of astronomical observatories. Closer to the Black Hills, the Lakotas are becoming more involved in the deliberations over management of public properties, where the landscapes hold cultural and religious significance. Recently, a group of Lakotas staged demonstrations at Badlands National Park, protesting the removal of fossil remains on park properties in which they have joint management responsibilities.

Presently, it is safe to say that Wind Cave National Park and all other public lands in the Black Hills still remain in a state of moral, if not legal, limbo because no final and acceptable resolution has been reached on their status *vis a vis* tribal claims of ownership. Whether one supports these rights or not is irrelevant to the fact that they are contested, and will remain so as long as the claims are not settled to the satisfaction of the parties involved in the dispute, which includes the federal government, state agencies, and private land holders on one side and the Sioux, Cheyennes, and Arapahos on the other. In the meantime, the administrators of public lands in the Black Hills will need to develop management policies in ways that consider tribal rights and interests pursuant to the free exercise of their religion, to their rights to access sites and properties of cultural, historical, and religious significance, and to the protection of these sites and the cultural properties affiliated with them. The need for park officials at Wind Cave National Park to involve Lakotas, Cheyennes, and Arapahos in policy-making pertaining to cultural properties over which they have significant interests is no longer a matter of choice: it is the law.